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In The

Supreme Court of the United States

October Term, 1996

COALITION FOR ECONOMIC EQUITY, et al.,

Petitioners,

v.

PETE WILSON, Governor of the State of California, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State may, consistent with the Equal Protection Clause as construed in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School Dist., No. 1*, 458 U.S. 457 (1982), selectively divest the political branches of local and state government of their traditional authority to enact race- or sex-based "preferential treatment" that is otherwise constitutionally permissible, while leaving these governmental entities free to enact and enforce all other preferences.

2. Whether a statewide initiative foreclosing state legislatures, executive agencies, and courts from granting "preferential treatment" that is closely tailored to remedying discrimination against women and minorities contravenes this Court's holding in *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996), that "a law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."

3. Whether a statewide initiative banning race- and sex-based "preferential treatment" violates the Supremacy Clause, by standing as an obstacle to Title VII's objective of promoting voluntary affirmative action to remedy past discrimination.

PARTIES TO THE PROCEEDING

Petitioners (Plaintiffs/Appellees below):

Coalition for Economic Equity
California NAACP
Northern California NAACP
California Labor Federation, AFL-CIO
Council of Asian American Business Associations, California
Chinese American Citizens Alliance
Women Construction Business Owners and Executives, California Chapter
United Minority Business Entrepreneurs
Chinese for Affirmative Action
Black Advocates in State Service
Asian Pacific American Labor Alliance
La Voz Chicana
Black Chamber of Commerce of California
Michelle Bennett
Nancy Burns
Floyd Chavez
Christopher Clay
Dana Cunningham, through his next friend Diana Gronert
Iran Celeste Davila
Shevada Dove, through her next friend Melodie Dove
Jessica Lopez
Virginia Mosqueda
Salvador Ochoa
Clifford Tong

PARTIES TO THE PROCEEDING

Respondents (Defendants/Appellants below):
Pete Wilson, Governor of the State of California
Daniel E. Lungren, Attorney General for the State of California
Joanne Corday Kozberg, Secretary of State and Consumer Services Agency of the State of California
James H. Gomez, Director of the California Department of Corrections

Respondent (Defendant-Intervenor/Appellant below):
Californians Against Discrimination and Preferences

Respondents (Defendants below):
Richard Atkinson, President of the University of California
Delaine Eastin, Superintendent of Public Instruction of the State of California
City and County of San Francisco
County of San Diego
County of Contra Costa
County of Marin
City of Pasadena

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The opinion of the Court of Appeals for the Ninth Circuit, filed April 8, 1997, is reported at 110 F.3d 1431. (Appendix A.) This opinion reversed an order of the United States District Court for the Northern District of California, filed December 23, 1996, which granted plaintiffs' motion for a preliminary injunction. The district court's opinion and order are reported at 946 F. Supp. 1480. (Appendix B.) On August 21, 1997, the court of appeals entered an order amending the April 8, 1997 opinion, denying the petition for rehearing, and rejecting the suggestion for rehearing en banc. (Appendix C.) On August 26, 1997, the court of appeals entered an order denying plaintiffs-appellees' motion for a stay of mandate pending petition for certiorari. (Appendix D.) On August 28, 1997, the court of appeals issued two opinions dissenting from the denial of rehearing en banc, authored by Judge Schroeder (joined by Judges Pregerson, Norris and Tashima) and Judge Norris (joined by Judges Schroeder, Pregerson, and Tashima), as well as an opinion by Judge Hawkins commenting on the denial of rehearing en banc. (Appendix F.)

JURISDICTION

The Ninth Circuit Court of Appeals' opinion was entered on April 8, 1997, and the order amending the opinion and denying the petition for rehearing was entered on August 21, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution
Title VII of the Civil Rights Act of 1964
42 U.S.C. sec. 1983
California Constitution, art. I, sec. 31 (Proposition 209)
(Appendix E.)

STATEMENT OF THE CASE

This case presents the issue whether the people of a state may by initiative strip state and local governmental entities of their previous power to enact or enforce constitutionally permissible "preferential treatment" on the basis of race or sex. The district court held that such a measure violates the Equal Protection Clause as construed in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), which applied the strictest scrutiny to laws that "remove[ ] the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* at 474. In both cases, this Court struck down voter-enacted initiatives that "plac[ed] unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice." *Id.* at 486. The Court of Appeals for the Ninth Circuit reversed in an opinion that raises important, novel and difficult questions for equal protection and supremacy jurisprudence. This petition respectfully requests the Court to exercise its certiorari jurisdiction in order to settle these questions.

1. Proposition 209

Proposition 209 is an initiative that amends Article I of the California Constitution to provide: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Cal. Const., art. I, sec. 31(a).[1]

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[1] California voters approved the measure by a margin of 54-46%, with a majority of males and whites voting in favor, and a majority of women, African-Americans, Latinos and Asians voting in opposition. The racial and gender breakdown of the vote was as follows:

This constitutional amendment applies not only to state agencies, but also to "any city, county, city and county, public university system, including the University of California, community college district, school district, special district or any other political subdivision or governmental instrumentality of or within the state." Cal. Const. Art. I, § 31(f). Proposition 209 applies to state and local legislatures, state and local executive agencies, and state courts. The measure extends not only to those race- or sex-based preferences independently forbidden by the United States Constitution or federal statute, but also to those race- or sex-based preferences that are wholly permissible under federal law. Indeed, Proposition 209 makes no exception even for those race- or sex-based preferences that are required by federal law. It provides a narrow exception for those preferences mandated by a "court order or consent decree which is in force as of the effective date," *id.* § 31(d), but not for any preferences mandated by a court order issued thereafter.

To the extent that Proposition 209 bans "discriminat[ion]" on the basis of race, sex, color, ethnicity, or national origin, it is merely redundant of existing state and federal antidiscrimination law. As the district court concluded, and the court of appeals did not dispute, "this language simply reaffirms existing anti-discrimination protections already provided by the United States and California Constitutions, and by the 1964 Civil Rights Act." *Coalition for Economic Equity ("CEE") v. Wilson*, 946 F. Supp. 1480, 1488 (N.D.Cal. 1996).

VOTER	YES(%)	NO(%)
Male	61%	39%
Female	48%	52%
White	63%	37%
Black	26%	74%
Latino	24%	76%
Asian	39%	61%

Coalition for Econ. Equity v. Wilson, 946 F.Supp. 1480, 1495 n.12 (N.D. Cal. 1996) (citing Pinkus decl. (*L.A. Times* poll)).

This language, accordingly, has never been at issue in this case.

The only issue in this case is the constitutionality of 209's ban on "preferential treatment . . . on the basis of race, sex, color, ethnicity, or national origin." It is beyond dispute that the sole reason for passage of Proposition 209 was to eliminate various otherwise constitutional affirmative action programs that benefit racial minorities and women. That is how 209 was described by its proponents and how it was characterized in the official ballot materials distributed to California voters.[2] Given that the rest of its mandate is merely duplicative of pre-existing law, that is Proposition 209's only conceivable objective.

While Proposition 209 eliminates pre-existing state and local discretion to enact race- and sex-based preferences in public employment, education and contracting – no matter how permissible or compelling the reason – it leaves intact state and local governments' pre-existing discretion to adopt any other preferences in those areas. For example, Proposition 209 leaves public universities free to grant admissions preferences based on applicants' geographical origin or the

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[2] For example, the Yes/No Statement prepared by the nonpartisan Legislative Analyst's Office, and published in the official pamphlet sent to all voters, states:

> A YES vote on this measure means: The elimination of those affirmative action programs for women and minorities run by the state or local governments in the areas of public employment, contracting, and education that give "preferential treatment" on the basis of sex, race, color, ethnicity, national origin.
>
> A NO vote on this measure means: State and local government affirmative action programs would remain in effect to the extent they are permitted under the United States Constitution.

Pls. Exh. 2, Legislative Analyst Office's "Yes/No" Statement, published in the Official Ballot Pamphlet; *see also* Pls. Exh. 3, Arguments for and against Proposition 209, published in the Official Ballot Pamphlet.

fact that they are children of alumni, donors, or friends of university officials.[3] Municipalities are free to grant hiring preferences to veterans or those with close political ties to local officials. All units of government may give contracting preferences to favored industries or businesses with powerful lobbyists. The only change in California law effected by Proposition 209 is to eliminate race- and sex-conscious programs that were permissible under pre-existing law.

2. Proceedings Below

a. District Court

Plaintiffs brought this action in the United States District Court for the Northern District of California, which had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) & (4). Plaintiffs consisted of the class of participants in race- and sex-based affirmative action programs all across California. On December 23, 1996, the district court issued a preliminary injunction barring enforcement of 209, but expressly

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[3] Non-merit-based preferences in the area of education are not uncommon, and inure mostly to the detriment of minorities. For example, a recent survey of acceptance of students at the nation's law schools for the 1990-91 application year demonstrated that of 42,287 white students accepted, 6,321 (12.6%) were not predicted to be admitted by application of LSAT scores and undergraduate grade point averages. Linda F. Wightman, "The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions," 72 *NYU L.R.* 1, 16-17 (1997); *see also* Ralph Frammolino et al., "UCLA Eased Entry Rules for the Rich, Well-Connected," *LA Times*, Mar. 21, 1996 at A-1 (reporting that chancellor and top aides gave back-channel admissions help to friends and relatives of donors, and that 75 privileged students were admitted while hundreds of others with better grades and higher SAT scores were denied). *See generally* Susan Sturm & Lani Guinier, "Rethinking the Process of Classification and Evaluation: The Future of Affirmative Action: Reclaiming the Innovative Idea," 84 *Calif.L.Rev* 953, 995-97 (1996) (collecting studies).

leaving each state and local governmental entity free "to voluntarily adopt, retain, amend, or repeal an affirmative action program." *CEE*, 946 F. Supp. at 1520-21 & n.53.

The district court found that the change in law effected by Proposition 209 is to "close th[e] narrow but significant window" left open by this Court within which "preferential treatment" based on race or sex is permissible when necessary to serve important governmental interests. *Id.* at 1489. Relying on a voluminous evidentiary record, the district court found that Proposition 209 would forbid enactment or enforcement of a "range of affirmative action programs currently in effect in California," including "[s]ome . . . programs [that] have been subjected to judicial challenge and found to be constitutionally permissible." *Id.* at 1495 n.16.

Specifically, the district court found that Proposition 209 would prevent enactment and enforcement of such race- and sex-conscious public education measures as "voluntary desegregation and 'magnet school' programs." *Id.* at 1493-94, 1497.[4] Proposition 209 would also affect a variety of programs at the public university level, including admissions, financial aid, counseling, and tutoring. *Id.* at 1494, 1497-98. In public contracting, the initiative would preclude state and local government measures narrowly tailored "to address the continuing effects of past or present bias against the use of women- and minority-owned contractors on public sector projects." *Id.* at 1496. Finally, in public employment, Proposition 209 would eliminate narrowly tailored affirmative action "designed to address the continuing effects of past or present bias against the hiring and/or promotion of women and minority employees" and thereby "substantially reduce opportunities for women and minorities. . . . " *Id.* at 1496-97 & n.17.

---

[4] As stated in the official ballot pamphlet analysis by the non-partisan Legislative Analyst's Office and studies performed by the State Senate Office of Research, the 1994-95 state budget included $122.1 million in General Fund support for voluntary race-based desegregation programs in 46 school districts, involving hundreds of thousands of students.

Based on these findings, the district court concluded that plaintiffs had demonstrated a probability of success on their claim that Proposition 209 violates the Equal Protection Clause of the Fourteenth Amendment as construed in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School Dist. No. 1* ("*Seattle*"), 458 U.S. 457 (1982). The court found that Proposition 209 "effectively precluded" racial minorities and women "from petitioning local and state policymakers and representatives to adopt, maintain or expand race- or gender-conscious affirmative action programs." *CEE*, 946 F. Supp. at 1499. Those seeking race- or sex-conscious remedies for discrimination "must first mount a statewide campaign to amend the state constitution, while those seeking preferential treatment on all other grounds need not surmount any new political hurdle." *Id.* at 1506. The district court therefore applied this Court's holding in *Seattle*, which struck down a Washington state initiative proscribing racially integrative school busing, on the ground that it denied minorities equal political access. The district court concluded that, just like the *Seattle* initiative, Proposition 209 unconstitutionally " 'removes the authority to address **a racial problem** – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests,' " *id.* at 1505 (quoting *Seattle*), and that the selective withdrawal of political discretion over a "gender problem" was likewise unconstitutional under the reasoning of *Hunter* and *Seattle*. *Id.* at 1501, 1510.

Finally, the district court found a likelihood of success on the merits of the claim that Proposition 209, to the extent that it bars any voluntary affirmative action in public sector employment, is preempted by Title VII of the Civil Rights Act. *Id.* at 1510-17.

b. Court of Appeals

The Court of Appeals for the Ninth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), reversed and vacated the preliminary injunction. Without disturbing the

district court's findings as to the initiative's scope,[5] the court of appeals held that the district court had abused its discretion in applying the *Hunter-Seattle* principle to Proposition 209. Likening Proposition 209 to the law at issue in *Crawford v. Board of Education*, 458 U.S. 527 (1982), which upheld a state constitutional amendment repealing a previous state constitutional mandate to remedy *de facto* segregation through race-based busing, the court of appeals asserted that "[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." 110 F.3d at 1446 (quoting *Crawford*, 458 U.S. at 535). The court of appeals also attempted to distinguish the race- and sex-conscious programs at issue here from the race-conscious busing programs at issue in *Seattle*. Specifically, the court of appeals held that Proposition 209 barred "preferential treatment" that "deprive[s] citizens of rights," while the *Seattle* initiative barred "reshuffle" programs that did not deprive other citizens of rights. *Id.* at 1445 & n.16.[6]

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[5] As stated in the district court's opinion: "[D]efendants agreed at oral argument that Proposition 209 prohibits some of these constitutionally permissible programs. They also failed to identify any other programs [other than race- and gender-conscious affirmative action] that would be affected by Proposition 209." 946 F. Supp. at 1489. The court of appeals expressly stated its agreement with the district court's conclusion that 209 targets race- and sex-based "preferential treatment" that had been permissible under pre-existing law, and noted that "the State does not dispute that Proposition 209 operates to eliminate such programs." 110 F.3d at 1437-38.

[6] The court of appeals considered but declined to find significance in the fact that Proposition 209 erects political obstacles to both race- *and* sex-conscious programs, while *Seattle* invalidated political obstacles solely to programs that took account of race. 110 F.3d at 1441-42. In considering whether the political restructuring cases applied at all to burdens placed on women, the court of appeals remarked: "The Supreme Court leaves us, quite frankly, a little perplexed as to the answer." *Id.* at 1444.

The court of appeals also held that Title VII did not preempt Proposition 209's bar on affirmative action in public employment. The court of appeals did not mention Title VII's purpose of encouraging voluntary remedies for official discrimination, or acknowledge this Court's holding that voluntary race- and sex-conscious programs play a "crucial role in furthering Title VII's purpose." *Johnson v. Transportation Agency*, 480 U.S. 616, 630 (1987). Instead, the court of appeals concluded that Proposition 209's blanket ban on race- and sex-conscious programs was perfectly consistent with – and indeed mirrored – the purposes and provisions of Title VII. *Id.* at 1446-48.

REASONS FOR GRANTING THE WRIT

1. The issue of how much flexibility state and local governments have to enact and enforce race- and sex-conscious preferences that are permitted or required by the federal Equal Protection Clause is one of fundamental and nationwide social and political significance.

The issue whether states and localities may deliberately give preferences to racial minorities and women in such areas as education, employment and contracting has sharply divided the nation and this Court for more than a generation. This Court has held that some such preferences are forbidden by the Equal Protection Clause. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). And yet this Court has also plainly stated that some such preferences are constitutionally permissible, and indeed, in some narrow circumstances, even constitutionally required. The Court has thus explicitly left open a window for state and local enactment and enforcement of some but not other race- and sex-based preferences. It is this "narrow but significant window," 946 F. Supp. at 1489, that Proposition 209 seeks not only to close but to lock shut.

a. Race. This Court has stated that race-based preferences are constitutionally permissible when narrowly tailored

to redress past race discrimination against racial minorities.[7] The Court has noted that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand Contractors Inc. v. Pena*, 515 U.S. 200, 237 (1995).

Indeed, this Court has repeatedly recognized that state and local entities not only have a compelling interest, but sometimes even a constitutional obligation, to institute race-conscious remedies for past discrimination.[8] As Justice Kennedy has put it: "[T]he State has the power to eradicate racial

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[7] The Court has also suggested that nonremedial purposes may sometimes justify race-based preferences. For example, Justice Powell's pivotal opinion in *Regents of the University of California v. Bakke* acknowledged that achieving racial diversity in an academic class would be a "compelling" justification for the use of race as a factor in public university admissions. 438 U.S. 265, 311-15 (1978); *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest.").

[8] *See, e.g, United States v. Paradise*, 480 U.S. 149, 167 (1987) (plurality) (noting that "[t]he Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor") (citing *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 274 (1986) (opinion of Powell, J.) and *id.* at 286 (O'Connor, J., concurring) ("remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program")); *see also Stuart v. Roache*, 951 F.2d 446, 449 (1st Cir. 1991) (Breyer, C.J.). In the area of school segregation, the Court has repeatedly held that school districts bear the "duty and responsibility" to eradicate the effects of *de jure* segregation. *Freeman v. Pitts*, 503 U.S. 467, 485 (1992); *see also United States v. Fordice*, 505 U.S. 717, 728 (1992) (state has obligation to "eradicate[ ] policies and practices traceable to its prior de jure dual system that continue to foster segregation" of

discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself." *Croson*, 488 U.S. at 518 (Kennedy, J., concurring); *see also Wygant*, 476 U.S. at 290 (O'Connor, J., concurring) (recognizing the importance of affirmative action in governments' efforts "to meet voluntarily their civil rights obligations"). Such an affirmative remedial duty might sometimes require the use of racial preferences, for example, where "necessary to break down patterns of deliberate exclusion." *Croson*, 488 U.S. at 509.

The affirmative duty on the part of state and local governments to employ race preferences is a narrow one, applicable only in those limited circumstances where a court would order it as a remedy for identifiable and unconstitutional past or present discrimination. Where a court would properly order such a constitutional remedy, the political branches of the relevant government surely have an identical constitutional obligation to remedy their own wrong – even before any plaintiff reaches the courthouse door. As Justice Kennedy has stated, "evidence which would support a judicial finding of intentional discrimination may suffice also to justify remedial legislative action, for it diminishes the constitutional responsibilities of the political branches to say they must wait to act until ordered to do so by a court." *Croson*, 488 U.S. at 519 (Kennedy, J., concurring); *see Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring) ("Those myriad factors [of human existence which can cause discrimination in a multitude of ways on racial grounds] are not readily corrected by judicial intervention, but are best addressed by the representative branches; time and again, we have recognized the ample authority legislatures possess to combat racial injustice.").

Yet this Court has also mapped out an additional area in which voluntary race-conscious measures are permissible, even if not constitutionally required. Neither *Croson* nor

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higher education); *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 437 (1968) (school districts responsible for segregation must remove vestiges "root and branch").

Adarand suggests that the political branches must limit themselves to adopting **only** those race-based preferences that would be ordered as a constitutional remedy by a court. To the contrary, both decisions recognize that state and local governments require a certain amount of breathing room if they are to carry out their duty to rectify past discrimination. Accordingly, while subjecting race-based preferences to strict scrutiny, this Court has sought explicitly to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' " *Adarand*, 515 U.S. at 237 (citation omitted).

Under such strict but not fatal scrutiny, this Court has recognized, governments may adopt race preferences that are narrowly tailored to redress specifically identified past discrimination – even if that discrimination was not committed intentionally by the state, and even if the scope of the redress is not limited to the individual victims of adjudicable discrimination. For example, while *City of Richmond v. J.A. Croson Co.* struck down a particular contracting preference for minority-owned business enterprises, the Court took pains to note that "[n]othing we say today precludes a state or local entity from taking action" – including race-conscious action – "to rectify the effects of identified discrimination **within its jurisdiction**," 488 U.S. at 509 (emphasis added), whether or not that past discrimination was committed intentionally by the state. Indeed, as Justice O'Connor wrote elsewhere in her *Croson* opinion, it might well be constitutionally permissible for a city or state entity to engage in race-conscious procurement policies where it had merely been a " 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry," rather than a deliberate practitioner of racial exclusion itself. *Id.* at 492 (O'Connor, J., joined by Rehnquist, C.J. and White, J.).

Likewise, the Court specifically noted in *Croson* that, "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion," *id.* at 509, whether or not such preferences were limited to making particular victims of adjudicable discrimination whole. Indeed, Justice Scalia concurred separately in both *Croson* and *Adarand* to emphasize his disagreement with the Court to the extent it authorized race-

conscious measures extending beyond remediation for "identified victims of discrimination." *Croson*, 488 U.S. at 526 (Scalia, J., concurring in judgment); *see also Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and in the judgment).

This limited but real breathing room the Court has afforded for race-conscious measures that are constitutionally permissible but not constitutionally required has had immense practical importance. It has enabled state and local governments to escape an otherwise impossible dilemma. If race- and sex-based preferences had been limited, as Justice Scalia has proposed, to remedial measures benefitting solely the adjudicated victims of past discrimination, then a state or locality trying conscientiously to do its constitutional duty to eradicate past discrimination would be vulnerable to litigation by whites to the extent it erred by overestimating the extent of its past wrongdoing. But if such governments erred instead on the side of underestimating the extent to which they were guilty of intentional discrimination, then they would be vulnerable to lawsuits brought by racial minorities.

This Court has long acknowledged the difficulty of this dilemma for state and local governments. As Justice O'Connor has warned: "[P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action **is not** taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action **is** taken." *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring); *see also Johnson v. Transportation Agency*, 480 U.S. 616, 652 (1987) (O'Connor, J., concurring) (noting that "this Court has long emphasized the importance of voluntary efforts to eliminate discrimination").

As a practical matter, the limited flexibility accorded by the "strict but not fatal" standard of *Croson* and *Adarand* provides the only sure solution to this dilemma. States and localities may adopt limited race preferences to redress past race discrimination, so long as they identify particular patterns of discrimination that they have either effected, facilitated, or merely negligently tolerated, and so long as they tailor preferential measures narrowly to eradicating that discrimination. In doing so, they gain prophylactic protection

against lawsuits by minorities without being subject to lawsuits by whites. State and local governments have availed themselves of this breathing room and enacted and maintained race-based preferences – even after *Croson* and *Adarand* – when they found such preferences necessary to eradicate the lingering effects of past discrimination,[9] and found that no race-neutral alternatives were adequate substitutes.[10]

b. Sex. As with race-based preferences, this Court has upheld sex-based preferences upon a substantial showing of remedial purpose,[11] and has demarcated a zone in which affirmative action for women is consitutionally permissible even if not constitutionally required. Indeed, the Court has given government greater latitude to adopt voluntary sex-based preferences designed to remedy past discrimination than it has with respect to race-based preferences. To be sure, the Court has struck down those sex-based preferences that do nothing more than embody "archaic and overbroad generalizations" about the respective roles of men and women. But it has readily upheld those sex-based preferences that serve the "important governmental objective" of "compensat[ing]

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[9] "Defendants have not questioned the substantial evidence before the Court showing that women and minorities continue to face the effects of past and present discrimination and thus will continue to have an interest in using the political process to seek remedial action through affirmative action programs." 946 F. Supp. at 1498 n.20.

[10] *See* Janice Franke, "Defining the Parameters of Permissible State and Local Affirmative Action Programs," 24 *Golden Gate U. L. Rev.* 387 (1994) (comparing race-based affirmative action programs that have failed the *Croson* standard with those that have survived); David Joseph, "Statistical Evidence of Discrimination and Affirmative Action: The Numbers Game," 67 *Temple L. Rev.* 451 (1994) (same).

[11] As with race, this Court has suggested that nonremedial purposes might sometimes be independently sufficient to justify sex-based preferences. For example, only two Terms ago, the Court acknowledged that diversity in educational offerings might justify sex-based preferences in public school admissions. *See United States v. Virginia*, 116 S. Ct. 2264, 2276 n.7 (1996).

women for past . . . discrimination." *Califano v. Webster*, 430 U.S. 313, 317-18 (1977). For example, this Court in *Webster* upheld a Social Security provision allowing women to discount more low-earning years than similarly situated men in calculating their retirement payouts, reasoning that Congress had adequately demonstrated that women had been "unfairly hindered from earning as much as men" in the first place. *Id.* at 318.

Sex-conscious measures adopted by states and localities are likewise plainly permissible if shown to be substantially related to the achievement of such important governmental objectives as remedying past discrimination. *See, e.g., United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996). And, just as the states and localities have availed themselves of the breathing room left open by this Court to enact voluntary race-conscious measures designed to eradicate the effect of past race discrimination, so they have enacted sex-based preferences in order to eradicate the effects of past discrimination against women.

c. Proposition 209. Proposition 209 seeks to lock shut the window for state and local action that decisions such as *Croson* and *Webster* have so painstakingly left open. Proposition 209 is sweepingly broad in scope.

First, Proposition 209 by its terms bars race- and sex-based preferences across the board, making no allowance even for those preferences that a state court would otherwise order as remediation for adjudicated violations of state constitutional or statutory antidiscrimination law. The exception in § 31(d) applies only to court orders in effect at the effective date of the amendment, not to any court orders thereafter.[12]

Second, Proposition 209 by its terms bars state and local legislative and executive bodies from adopting even those race- and sex-based preferences that they believe are constitutionally required in order to remedy past discrimination that

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[12] Proposition 209 does not even make an exception for race- or sex-based preferences ordered by a federal or state court as remediation for discrimination against racial minorities or women under federal law. Such court orders, however, would of course displace Proposition 209 under the Supremacy Clause.

they have intentionally practiced or aided and abetted. To be sure, Proposition 209 leaves women and minorities free to sue these governments under federal law and to seek race- or sex-based preferences as a remedy. But it thus works a rearrangement of the structural prerogatives of our federal system, in effect transferring discretion to correct discrimination in the areas of education, contracting, and employment from state governments, including state courts, to the federal judiciary. Such a transfer is unprecedented and utterly out of keeping with a system that relies for enforcement of the Constitution on the political branches as well as the courts, and on state no less than federal officials.

Third, Proposition 209 bars the narrow but significant range of race- and sex-based preferences that, even if not constitutionally required, are constititutionally permissible under the "strict but not fatal" standard set forth in *Croson* and the "exceedingly persuasive" standard reiterated in *Virginia*. Such voluntary preferences, of course, need never be enacted in the first place; and if they are enacted, they may readily be repealed by the enacting entity. But Proposition 209 eliminates the breathing room that this Court's precedents have afforded state and local governments even to consider enacting such preferences. It thus places state and local government on a knife's edge: overestimate the extent of intentional past discrimination, and be liable to a successful suit by whites or men under Proposition 209; underestimate it, and be equally open to successful litigation by minorities and women under federal law.

If this Court lets the Ninth Circuit's ruling stand, these sweeping effects on state and local race and sex preferences will rapidly multiply nationwide. Measures similar to Proposition 209 have already been proposed in at least 26 states, and petition drives have begun in a number of them. *See* Sam Howe Verhovek, "After the Election: Policy Momentum Shifts; Vote in California is Motivating Foes of Anti-Bias Plans," *N.Y. Times*, Nov. 10, 1996, at 1; Terry Eastland, "Formula 209; Others Adopt the Language that Won in California," *American Spectator*, Jan. 1997, at 58, 59. Thus a decision whether the court below correctly upheld Proposition 209 is of vital political and social significance to the nation.

2. This Court should resolve whether the decision below is consistent with the holdings of *Hunter v. Erickson* and *Washington v. Seattle School Dist. No 1.*

Nearly three decades ago, this Court held that a state law violates the Equal Protection Clause when it "mak[es] it more difficult for certain racial . . . minorities [than for other members of the community] to achieve legislation that is in their interest." *Hunter v. Erickson*, 393 U.S. 385, 395 (1969). In *Hunter*, the Court invalidated a referendum adopted by a majority of voters of the city of Akron, Ohio, that amended the city charter to require popular approval of any ordinance regulating real estate transactions "on the basis of race, color, religion, national origin or ancestry. . . . " *Id.* at 387. The charter amendment thus not only repealed a fair housing ordinance previously enacted by the city council, "but also required the approval of the electors before any future [housing discrimination] ordinance could take effect." *Id.* at 389-90.

This Court, by a vote of 8-1, struck down the Akron amendment, finding that it "drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends." *Id.* at 390. The Court readily discounted the facial neutrality of the charter amendment, which "dr[ew] no distinctions among racial and religious groups," finding that it would nonetheless uniquely disadvantage those benefitting from race-conscious fair housing laws – i.e., minorities – by forcing them to run a legislative "gauntlet" of popular approval that other laws and thus other groups were spared. *Id.* at 390-91. As the Court concluded, "[t]he reality is that the law's impact falls on the minority." *Id.* at 391.

In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the Court reaffirmed that, while the state may make it more difficult for everyone across the board to enact or enforce laws on a particular subject matter, it may not make it selectively more difficult for racial minorities alone.

Seattle held that the Equal Protection Clause prohibits any law that "subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Id.* at 467. Like the decision in *Hunter*, *Seattle* barred a state from selectively burdening attempts to secure programs that "inure[ ] primarily to the benefit of the minority." *Seattle*, 458 U.S. at 472; *see Hunter*, 393 U.S. at 391.

Specifically, *Seattle* invalidated Initiative 350, a state measure that provided in a seemingly neutral fashion (it made no mention of race or racial minorities whatsoever) that "no school board . . . shall directly or indirectly require any student to attend a school other than [the geographically closest school]." 458 U.S. at 462. The initiative, however, contained so many exceptions to this general prohibition that its sole practical effect was to bar race-conscious busing to redress *de facto* segregation, while permitting busing for any other reason. *Id.* at 462-63. After Initiative 350, it became pointless for advocates of race-conscious busing even to approach their local or state school boards to seek such measures. While the Court recognized that both minority and non-minority citizens might favor busing programs, it concluded nonetheless that Initiative 350 "allocat[ed] governmental power nonneutrally, by explicitly using the **racial** nature of a decision to determine the decisionmaking process," in violation of the *Hunter* principle. *Id.* at 470.[13]

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[13] Like other strands of equal protection jurisprudence, the *Hunter-Seattle* doctrine accords heightened scrutiny to laws lacking sufficient generality. By restructuring the political process so that issues of special interest to minorities – and only those issues – were moved from the local to the statewide level, the Washington initiative effectively gerrymandered the political process in a way that was unfair to minorities. *Seattle* is thus in keeping with a long line of cases equally concerned with preserving a "just framework within which the diverse political groups in our society may fairly compete." *Seattle*, 458 U.S. at 470 (quoting *Hunter*, 393 U.S. at 393); *see also id.* at 467 ("The Equal Protection Clause of the Fourteenth Amendment

Proposition 209 works precisely the same sort of change in the rules of political engagement that this Court condemned in *Seattle*. Here, as in *Seattle*, the political process before the initiative gave discretion to state agencies and local legislative and executive bodies over the matters reached by the initiative. Here, as in *Seattle*, that prior political discretion included the power to enact constitutionally permissible measures designed to correct past race discrimination and promote racial integration. And here, as in *Seattle*, the initiative leaves that discretion wholly in place, with the sole exception of race- (and here sex-) based preferences that, like the busing measures barred by the *Seattle* initiative, inure to the benefit of racial minorities (and, here, women).[14]

Thus here, as in *Seattle*, the initiative imposes a "comparative burden on minority interests," *id.* at 475, by "remov[ing] the authority to address a racial [and, here, a sex] problem – and only a racial [and, here, a sex] problem – from the

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guarantees racial minorities the right to full participation in the political life of the community.") (citing *White v. Regester*, 412 U.S. 755 (1973)); *Hunter*, 393 U.S. at 393 ("[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.") (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)).

[14] In fact, the programs banned by the two initiatives literally overlap – Proposition 209 bans precisely the same programs banned by 350, and then some. As the *Seattle* Court recognized, Initiative 350 prohibited enactment of racial reassignment programs running the full gamut from non-court-ordered busing to "racially controlled enrollment at magnet schools." *Seattle*, 458 U.S. at 464-65 & n.7. Proposition 209 does exactly the same thing, barring the adoption of race-conscious enrollment procedures at magnet schools and other race-conscious school desegregation programs. *CEE*, 946 F.Supp. at 1494, 1497. Just like the initiative in *Seattle*, 209 removes from the political process authority over remedies for both *de facto* segregation and *de jure* segregation. *Seattle*, 458 U.S. at 465-66 & n.10.

existing decisionmaking body." *Id.* at 474. After Proposition 209, for example, women can no longer appeal to county boards of supervisors to rectify years of systematic sex discrimination by a sheriff's department. No matter the volume of evidence of past sex discrimination, or the intractability of that discrimination to sex-neutral remedies, the ordinary political process is closed off to women seeking sex-conscious remedies. Instead, they must either finance a statewide initiative and persuade a majority of California's voters to enact a local sex-conscious plan or, alternatively, file a class-action lawsuit and thereby place the matter before a federal judge. By contrast, Proposition 209 leaves the political process open to those seeking remedies for other kinds of discrimination and those seeking preferences of every other stripe, no matter their unfairness or their lack of relation to merit-based outcomes.

The court of appeals, however, purported to distinguish *Seattle* in three critical ways. Each of these purported distinctions either creates a significant conflict with this Court's equal protection jurisprudence or raises questions so novel and far-reaching as to warrant this Court's review.

First, the appeals court found the *Hunter-Seattle* line of cases supposedly inapplicable because Proposition 209 is facially neutral, banning classifications that work to the advantage or disadvantage of minorities and women. Despite the uncontradicted evidence showing that Proposition 209's sole change in law was to ban constitutionally permissible programs benefitting women and minorities – and that the initiative's antidiscrimination mandate was pure surplusage – the court characterized 209 as "a law that addresses in neutral fashion race-related and gender-related matters." 110 F.3d at 1444, 1446. The court of appeals then held it "paradoxical" that a law like Proposition 209, carefully crafted to be neutral on its face, could somehow amount to impermissible discrimination. 110 F.3d at 1446.[15]

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[15] The court of appeals relied in part upon *Seattle*'s companion case, *Crawford v. Board of Education*, 458 U.S. 527

This holding, however superficially attractive, would if sustained necessarily overrule both *Seattle* and *Hunter*. In those decisions, the Court stressed that the key question is not whether the prohibition was cast in facially race-neutral terms. Rather, the issue is whether "the practical effect of [the initiative] is to work a reallocation of power" that tilts the political playing field solely against racial minorities. *Seattle*, 458 U.S. at 474; *see Hunter*, 393 U.S. at 391. Thus, despite Initiative 350's complete lack of any reference to race, the *Seattle* Court had no difficulty discerning that the programs banned by the initiative "inure[d] primarily to the benefit of the minority and [were] designed for that purpose." *Id.* at 472.

(1982), in asserting that Proposition 209 "addresses in a neutral fashion, race-related and gender-related matters." 110 F.3d at 1446. *Crawford*, however, is inapposite. *Crawford* upheld Proposition I, a popularly enacted amendment of the California constitution overriding a prior judicial interpretation of that state constitution requiring racial busing to redress *de facto* segregation. Proposition I imposed no burden on the ability of any group to pursue racial busing measures through the political process. State and local governments remained free voluntarily to adopt race-conscious busing to redress *de facto* segregation. *See id.* at 536 & n.12 (noting that "[i]n this respect this case differs from the situation presented in *[Seattle]*"). Proposition I was instead a "mere repeal" of the California Supreme Court's unusually broad interpretation of the state's equal protection clause. In upholding Proposition I, this Court explained: "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Id.* at 539.

Proposition 209, by contrast, does more than effect a "simple repeal" of race- and sex-conscious affirmative action laws. It prospectively prohibits any unit of state and local government from ever adopting a program according "preferential treatment" based on race or sex. *See* Amar & Caminker, "Equal Protection, Unequal Political Burdens, and the CCRI," 23 *Hast. Con. L.Q.* 1019, 1049-53 (1996).

Proposition 209 similarly aims solely at programs designed to benefit minorities and women.

Proposition 209 is no more saved by its antidiscrimination clause than the *Seattle* initiative would have been if it had included a superfluous provision stating that "No school board shall segregate or discriminate on the basis of race" alongside its prohibition of desegregative busing plans. Such a provision, like the antidiscrimination provision of 209, is redundant of pre-existing law and therefore irrelevant to the constitutional analysis. The only operative clause in both instances is the one making it harder to enact race-conscious legislation in minorities' favor – the very sort of racially selective burden condemned in both *Hunter* and *Seattle*.

Second, the court of appeals held that *Hunter* and *Seattle* do not govern this case because the race and sex preferences in contracting, education and employment that are blocked by 209 – unlike the fair housing laws and busing programs that were blocked by the laws invalidated in those cases – supposedly implicate greater harms to the constitutional interests of whites (and men). As the court of appeals put it, "equal protection rights against political obstructions to **equal** treatment" do not entail "equal protection rights against political obstructions to **preferential** treatment." 110 F.3d at 1445 (emphasis added). According to the court of appeals, the race-conscious busing programs at issue in *Seattle* merely "reshuffl[ed]" students without implicating any constitutional rights on the part of white students, while Proposition 209 creates a "stacked deck" in favor of minorities and thereby "trench[es] on Fourteenth Amendment values." *Id.* at 1445 & n.16.

Whether or not the existence of constitutional interests on both sides might distinguish *Hunter*, it clearly fails to distinguish *Seattle*. The busing programs forbidden by the *Seattle* initiative, like the programs forbidden by Proposition 209, imposed distinctions based on race. Black schoolchildren were allocated places in schools outside the neighborhoods in which they lived based solely on their race, displacing white students who otherwise would have attended those schools under a race-neutral attendance policy. Like race-conscious

affirmative action measures, race-conscious busing might well violate the constitutional rights of whites unless appropriately tailored to redress past or present race discrimination or segregation. *See Missouri v. Jenkins*, 515 U.S. at 112 (O'Connor, J., concurring) (indicating that race-conscious busing is subject to strict scrutiny). Nonetheless, *Seattle* held that minorities enjoyed an equal protection right to seek such beneficial race-conscious measures insofar as they were constitutionally permissible or required. Thus, while **some** race and sex preferences, like some busing programs, might be constitutionally forbidden, a barrier to the enactment of **any** race- (and sex-) based preferences, no matter how permissible, falls squarely within the constitutional prohibition set forth in *Seattle*.

Seeking to escape the logic of *Seattle*, the court of appeals suggests that a busing program drawing distinctions based on race should be subject to less searching scrutiny than affirmative action programs drawing distinctions based on race. But this novel concoction of a category of *de minimis* race-based measures (i.e. so-called "reshuffle" programs) finds no support in this Court's precedents. To the contrary, this Court has applied strict scrutiny to **all** race-based classifications – whether or not they exclusively burden one race more than another.[16]

In any event, the focus of *Hunter* and *Seattle* was on equal access to the political process and not on the end-product of that process. The question was simply whether the programs that could no longer be sought from local representative bodies would "inure primarily to the benefit" of racial minorities if enacted. Just like the voter-enacted initiatives in those cases, 209 nonneutrally restructures the political

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[16] *See, e.g., Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (applying strict scrutiny to anti-miscegenation statute drawing "distinctions . . . according to race" even though it equally burdened both blacks and whites); *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (holding strict scrutiny applicable to electoral redistricting that "expressly distinguish[ed] among citizens because of their race," though not diluting anyone's vote).

process to the detriment of minority interests. Before Proposition 209, as before Initiative 350, racial minorities (and here, women) could seek beneficial race-specific (and here, sex-specific) legislation or executive action in the discretion of their state or local representatives; after Proposition 209, as after Initiative 350, such measures require the far more onerous task of appealing to the statewide electorate.[17] The anti-minority tilt in the political playing field in each case is indistinguishable, whether or not one might otherwise differentiate busing from affirmative action in employment, education and contracting.

Third, the court of appeals suggested that the state's greater power to reserve to itself all decisions on public employment, education, and contracting somehow includes the lesser power **selectively** to withdraw from state agencies and local governments discretion it had previously granted to them to adopt race- and sex-conscious preferences in these areas. This holding is plainly inconsistent with *Seattle* and *Hunter*. Nothing in those decisions bars states and localities from repealing their own affirmative action measures once enacted. *See Seattle, Crawford*, 458 U.S. at 483. And nothing in those decisions prevents the state from making the enactment of policies **generally** more difficult. *See Seattle*, 458 U.S. at 469-70 (noting that "laws structuring political institutions or allocating political power according to 'neutral principles' . . . are not subject to equal protection attack, though they may 'make it more difficult for minorities to achieve favorable legislation' "); *see also Hunter*, 393 U.S. at 393-94 (Harlan, J., concurring).

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[17] Proposition 209's impact on the political process is even more burdensome than that of Initiative 350. Proposition 209 is an amendment to California's Constitution, and can be modified or altered only by the California electorate. 946 F. Supp. at 1498-99. By contrast, Initiative 350 could be repealed by the state legislature after two years and could be "amended within two years by a vote of two-thirds of each house of the legislature." *Seattle* 458 U.S. at 462 n.4.

Thus, the state and its subdivisions might repeal any affirmative action program that is not itself constitutionally required. Such repeals work no change in access to the political process whatsoever. Or the state might eliminate all preferences (including those based on race and sex) wholesale, by, for example, requiring that state agencies and subdivisions award contracts to the lowest responsible bidder. The state might also undo all race- and sex-based preferences in public university admissions by specifying particular admissions criteria, such as grade point averages and performance on standardized exams, without violating the *Hunter-Seattle* principle. Such a change would alter the rules of political access, but for everyone, not just those seeking beneficial legislation on the basis of race or sex. But, as *Seattle* made clear, the greater power to make race-neutral changes in access to the political process clearly does not entail any power to take the discriminatory and hardly "lesser" shortcut of **selectively** eliminating discretion over race and sex preferences alone.

In sum, this case is materially indistinguishable from *Seattle*.[18] The decision below conflicts with both *Hunter* and

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[18] The only respect in which this case might be thought to differ from *Seattle* is one considered but ultimately not relied upon by the court of appeals: namely, that Proposition 209 makes it selectively more difficult for women as well as for racial minorities to seek beneficial legislation. But the logic of *Hunter* and *Seattle* applies as clearly to selective political burdens on women as it does to selective political burdens on racial minorities. Women, like racial minorities, are subject to "conditions of prejudice" that have historically inhibited their political power. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). For that very reason, this Court requires an "exceedingly persuasive reason" before a sex-discriminatory law may be upheld. *United States v. Virginia*, 116 S. Ct. at 2275. Whether or not the *Hunter-Seattle* principle extends beyond classifications on the basis of group membership triggering heightened scrutiny, it surely applies to those that do, including at least sex as well as race. And, in any event, the addition of gender to 209

Seattle. Indeed, under the reasoning applied by the court of appeals, *Seattle* itself would have been decided the other way.

3. This Court should resolve whether the decision below is consistent with the holding of *Romer v. Evans*.

Independently of its bar on the selective denial of access to the political process, the Equal Protection Clause bars the selective denial of opportunity to seek protection against discrimination. Just two terms ago, this Court held:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

Romer v. Evans, 116 S. Ct. 1620, 1628 (1996). This equal protection principle is separate and independent from the *Hunter-Seattle* principle. *See id.* at 1624 (noting that the Colorado Supreme Court had relied on *Hunter-Seattle*, but affirming on a "rationale different from that adopted by the State Supreme Court"). Applying this principle, *Romer* invalidated Colorado's Amendment 2, an initiative that disabled "government and each of its parts" from remedying discrimination against gays and lesbians.

Like Amendment 2, Proposition 209 prevents particular identified groups from seeking protection from discrimination against them – here, in the form of remedial race- and sex-based preferences – from every unit of government in the state, including the state courts. Of course, racial minorities and women are not wholly foreclosed under 209 from seeking

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hardly cures its constitutional infirmity with respect to race – whether or not, as we argue, it aggravates 209's constitutional flaws.

any state antidiscrimination remedies, as gay men and lesbians were foreclosed under Amendment 2. But *Romer* did not turn on the absolute foreclosure of all remedies to gay men and lesbians, *see id.* at 1626-27 (declining to decide whether "homosexuals could find some safe harbor in [state antidiscrimination] laws of general application"), but on the **comparative** disability Colorado imposed upon them in relation to other groups. In this respect, Proposition 209 works a harm empirically similar to that worked by Amendment 2: Under 209, every unit of state and local government is closed off to minorities and women seeking constitutionally permissible race- and sex-conscious programs to remedy discrimination. All other interest groups may still seek all types of remedies for past discrimination, or preferences based on any other criteria. By making it "more difficult for one group of citizens than for all others to seek aid from the government," Proposition 209 constitutes a "denial of equal protection of the laws in the most literal sense." *Romer*, 116 S. Ct. at 1628.

4. This Court should clarify whether states may enact laws that impede Title VII's national policy of encouraging state and local governments voluntarily to remedy their own past discrimination.

This Court has consistently rejected the claim that Title VII mandates absolutely colorblind and sexblind hiring and promotion practices. To the contrary, it has recognized that Congress meant to encourage public and private employers to meet their civil rights obligations through voluntary race- and sex-conscious affirmative action programs. Such measures are vital to fulfill Title VII's goal of "break[ing] down old patterns of racial segregation and hierarchy" *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979), while allowing employers to avoid the trouble and expense of litigation.

The district court found that Proposition 209 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of Title VII, by outlawing a critical means of securing voluntary compliance with this statute. 946 F. Supp. at 1511 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), 1513-17. The court of appeals nevertheless rejected

the claim that 209 was preempted by Title VII, holding the two laws "entirely consistent." 110 F.3d at 1447.[19]

In so holding, the panel ignored decisions of this Court holding that government authority to design and implement narrowly-tailored race- and sex-conscious programs play a "crucial role in furthering Title VII's purpose." *Johnson*, 480 U.S. at 630. As Justice O'Connor has stated, voluntary compliance is particularly vital to public-sector employers:

> The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance.

Wygant, 476 U.S. at 290 (concurring opinion).[20] Indeed, in extending coverage of Title VII to state and local public entities, Congress expressly found that:

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[19] The court of appeals erroneously stated that "all Title VII preempts" are state laws that actually conflict with Title VII by requiring an act that would be an unlawful employment practice under Title VII. 110 F.3d at 1447 (citing *Cal. Fed. S&L Ass'n v. Guerra*, 479 U.S. 272 (1987) (plurality) and 42 U.S.C. § 2000e-7). In fact, *Guerra* explicitly recognized that § 1104 (42 U.S.C. § 2000h-4), which applies to the entirety of the Civil Rights Act, **forbids** state laws that are "inconsistent with any of the purposes of this Act". *Guerra*, 479 U.S. at 282; *see UAW v. Johnson Controls*, 499 U.S. 187, 209 (1991) (restating *Guerra's* holding that law was "not preempted by Title VII because it was not inconsistent with the purposes of the federal statute **and** did not require an act that was unlawful under Title VII") (emphasis added). For the reasons stated above, Proposition 209 is inconsistent with Title VII's purpose of encouraging voluntary compliance and preserving the crucial tool of voluntary affirmative action.

[20] *See also Weber*, 443 U.S. at 204 (Title VII intended to cause "employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.").

> Discrimination by government . . . serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government.

Id. at 290 (quoting S.Rep. 92-415, at 10 (1971)).

There is no doubt that Congress viewed voluntary action on the part of employers to be preferable to court-ordered remedies for past discrimination: "Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII." *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 515 (1986).[21] Proposition 209, however, dissolves all state and local power voluntarily to redress past official discrimination through race- and sex-conscious means, no matter how egregious or compelling the evidence, or how intractable the effects of that discrimination.

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[21] The Court in *Local No. 93*, 478 U.S. at 516, quoted with approval EEOC guidelines (29 C.F.R. § 1608.1(c)) which specifically endorse voluntary affirmative action as consistent with Congress' purpose:

> The principle of nondiscrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to title VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of title VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII.

In some cases, "affirmative race-conscious relief may be the only means available 'to assure equality of employment opportunities. . . . ' " *Local 28, Sheet Metal Workers v. EEOC*, 428 U.S. 421, 450 (1986) (plurality opinion) (emphasis added).

At the same time, it effectuates a wholesale transfer of this authority from elected officials to the federal judiciary. It thus obliterates the " 'breathing room' for employer initiatives" contemplated by Congress. *Johnson*, 480 U.S. at 645 (Stevens, J., concurring); *see also Wygant*, 476 U.S. at 290 (O'Connor, J., concurring) (to prohibit all race- and sex-conscious programs "would severely undermine public employers' incentive to meet voluntarily their civil rights obligations."). Even when faced with claims of intractable official discrimination against women and minorities, public officials have no choice but to throw up their hands. Proposition 209 leaves them without authority to undertake affirmative remedial action on their own, and with no recourse but passively to await litigation.

Proposition 209 thus eliminates the safe passage that Congress has afforded to state and local governments "between the competing hazards of liability to minorities if affirmative action **is not** taken and liability to nonminorities if affirmative action **is** taken." *Johnson*, 480 U.S. at 652 (O'Connor, J., concurring) (quoting *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring)). After 209, it is exclusively the province of the federal judiciary to decide when, if, and how corrective measures are to be instituted. Nothing could be more clearly contrary to Title VII's purpose of leaving employers free – and, indeed, of encouraging them – voluntarily to remedy their own past discrimination.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

A Opinion of United States Court of Appeals for the Ninth Circuit vacating preliminary injunction, 110 F.3d 1431 (April 8, 1997) A1

B Opinion of the United States District Court for the Northern District of California granting preliminary injunction, 946 F. Supp. 1480 (December 23, 1996) B1

C Order of United States Court of Appeals for the Ninth Circuit amending April 8, 1997 opinion, denying petition for rehearing, and rejecting suggestion for rehearing en banc (August 21, 1997) C1

D Order of United States Court of Appeals for the Ninth Circuit denying motion for stay of mandate (August 26, 1997) D1

E Text of constitutional and statutory provisions involved: E1

1 Fourteenth Amendment to U.S. Constitution E1

2 Excerpts from Title VII of the Civil Rights Act of 1964 and regulations promulgated thereunder E3

3 42 U.S.C. § 1983 ..... E14

4 California Constitution, art. I, sec. 31 (Proposition 209) E15

F Opinions Dissenting from the denial of rehearing en banc by Judge Schroeder (joined by Judges Pregerson, Norris, and Tashima) and by Judge Norris (joined by Judges Schroeder, Pregerson, and Tashima); an opinion by Judge Hawkins commentary on the denial of rehearing en banc. (August 28, 1997) F1

APPENDIX A

The COALITION FOR ECONOMIC EQUITY; California NAACP; Northern California NAACP; California Labor Federation; AFL-CIO; Council of Asian American Business Associations, California; Chinese American Citizens' Alliance; Women Construction Business Owners and Executives, California Chapter; United Minority Business Entrepreneurs; Chinese for Affirmative Action; Black Advocates in State Service; Asian Pacific American Labor Alliance; La Voz Chicana; Black Chamber of Commerce of California; Michele Bennett; Nancy Burns; Floyd Chavez; Christopher Clay; Dana Cunningham; Iran Celeste Davila; Shevade Dove, nfr Melodie Dove; Jessica Lopez; Virginia Mosqueda; Salvador Ochoa; Clifford Tong, Plaintiffs/Appellees,

v.

Pete WILSON, Governor; Daniel E. Lundgren, Attorney General for the State of California; Joanne Corday Kozberg, Secretary of State and Consumer Services Agency and Cabinet Member; James Gomez, Dir., Dept. of Corr., Defendants/Appellants,

Californians Against Discrimination and Preferences, Inc., Defendant-Intervenor/Appellant.

Nos. 97-15030, 97-15031.

United States Court of Appeals,

Ninth Circuit.

Argued Feb. 10, 1997.

Submission Deferred, and
Submitted March 3, 1997.

Decided April 8, 1997.

Individuals and groups claiming to represent interests of racial minorities and women filed complaint alleging that provision of the California Constitution prohibiting public race and gneder preferences denied equal protection, and was void under the supremacy clause because it conflicted with federal civil rights statutes. The United States District Court for the Northern District Court for the Northern District of California, Thelton E. Henderson, J., Chief Judge, 946 F.Supp. 1480, granted preliminary injunction enjoining the state from implementing provision, and the state appealed. The Court of Appeals, O'Scannlain, Circuit Judge, held that: (1) provision does not violate the equal protection clause in any conventional sense; (2) provision does not violate the equal protection clause on theory that imposes an unequal "political structure" that denies women and minorities a right to seek preferential treatment from the lowest level of government; (3) provision was not preempted by Title VII; and (4) with no likelihood of success on the merits of equal protection and preemption claims, plaintiffs were not entitled to preliminary injunction.

Preliminary injunction vacated; stay denied as moot; remanded.

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Tamu K. Sudduth, Morrison & Foerster, San Francisco, CA, for amici curiae A. Ruiz Construction Company and Associates, Inc., Chiang C.M. Construction, Inc., and Cresci Electric, Inc.

Jack D. Forbes, University of California, Davis, for amicus curiae Jack D. Forbes.

Sharon L. Browne, Pacific Legal Foundation, Sacramento, CA, for amici curiae Richard Hanlin, et al.

Theodore B. Olsen, Gibson, Dunn & Crutcher, Washington, DC, for amicus curiae Independent Women's Forum.

Clint Bolick, Institute for Justice, Washington, DC, for amici curiae Institute for Justice et al.

G. Michael German, Law Offices of G. Michael German, San Francisco, CA, for amicus curiae Log Cabin Republicans of California.

Frank Wu, Howard University School of Law, Washington, DC, for amici curiae National Asian Pacific American Legal Consortium et al.

Kevin T. Snider, United States Justice Foundation, Escondido, CA, for amici curiae United States Justice Foundation et al.

Appeal from the United States District Court for the Northern District of California, Thelton E. Henderson, District Judge, Presiding. D.C. No. CV-96-4024-TEH.

Before: O'SCANNLAIN, LEAVY and KLEINFELD, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must decide whether a provision of the California Constitution prohibiting public race and gender preferences violates the Equal Protection Clause of the United States Constitution.

I

A

On November 5, 1996, the people of the State of California adopted the California Civil Rights Initiative as an amendment to their Constitution. The initiative, which appeared on the ballot as Proposition 209, provides in relevant part that

> [t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Cal. Const. art. 1, § 31(a).[1]

The California Legislative Analyst's Office portrayed Proposition 209 to the voters as a measure that would eliminate public race-based and gender-based affirmative action programs. The California Ballot Pamphlet explained to voters that:

> A YES vote on [Proposition 209] means: The elimination of those affirmative action programs for women and minorities run by the state or local governments in the areas of public employment, contracting, and education that give "preferential treatment" on the basis of sex, race, color, ethnicity, or national origin.
>
> A NO vote on this measure means State and local government affirmative action programs

---

[1] When we use the word "race," we refer also to color, ethnicity, and national origin.

would remain in effect to the extent they are permitted under the United States Constitution.

The Ballot Pamphlet also included arguments by proponents and opponents of Proposition 209. Proponents urged a "yes" vote, arguing that:

> A generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides.
>
> . . . .
>
> And two wrongs don't make a right! Today, students are being rejected from public universities because of their RACE. Job applicants are turned away because their RACE does not meet some "goal" or "timetable." Contracts are awarded to high bidders because they are of the preferred RACE.
>
> That's just plain wrong and unjust. Government should not discriminate. It must not give a job, a university admission, or a contract based on race or sex. Government must judge all people equally, without discrimination!
>
> And, remember, Proposition 209 keeps in place all federal and state protections against discrimination!

Opponents of Proposition 209 urged a "no" vote, responding that:

> California law currently allows tutoring, mentoring, outreach, recruitment, and counseling to help ensure equal opportunity for women and minorities. Proposition 209 will eliminate affirmative action programs like these that help

> achieve equal opportunity for women and minorities in public employment, education and contracting. Instead of reforming affirmative action to make it fair for everyone, Proposition 209 makes the current problem worse.
>
> . . . .

The initiative's language is so broad and misleading that it eliminates equal opportunity programs including:

> – tutoring and mentoring for minority and women students;
>
> – affirmative action that encourages the hiring and promotion of qualified women and minorities;
>
> – outreach and recruitment programs to encourage applicants for government jobs and contracts; and
>
> – programs designed to encourage girls to study and pursue careers in math and science.

Proposition 209 passed by a margin of 54 to 46 percent; of nearly 9 million Californians casting ballots, 4,736,180 voted in favor of the initiative and 3,986,196 voted against it.

B

On the day after the election, November 6, 1996, several individuals and groups ("plaintiffs") claiming to represent the interests of racial minorities and women filed a complaint in the Northern District of California against several officials and political subdivisions of the

State of California ("the State").[2] The complaint, brought under 42 U.S.C. § 1983, alleges that Proposition 209, first, denies racial minorities and women the equal protection of the laws guaranteed by the Fourteenth Amendment, and, second, is void under the Supremacy Clause because it conflicts with Titles VI and VII of the Civil Rights Act of 1964, and Title IX of the Educational Amendments of 1972. As relief, plaintiffs seek a declaration that Proposition 209 is unconstitutional and a permanent injunction enjoining the State from implementing and enforcing it.

With their complaint, plaintiffs filed an application for a temporary restraining order ("TRO") and a preliminary injunction. The district court entered a TRO on November 27, 1996, and granted a preliminary injunction on December 23, 1996.[3] The preliminary injunction enjoins the State, pending trial or final judgment, "from implementing or enforcing Proposition 209 insofar as said amendment to the Constitution of the State of California purports to prohibit or affect affirmative action programs in public employment, public education or public contracting." *Coalition for Econ. Equity v. Wilson*, 946 F.Supp. 1480, 1520-21 (N.D.Cal.1996).

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[2] When we refer to "the State," we mean, more specifically, Defendants/Appellants. Certain defendants did not appeal the preliminary injunction, including the City and County of San Francisco, the County of Marin, and Delaine Eastin, all of whom have filed briefs and papers in support of Plaintiffs/Appellees.

[3] The district court also granted plaintiffs' motion provisionally to certify the plaintiff class on November 27, 1996, and their motion to certify the defendant class on December 16, 1996.

The district court provided extensive findings of fact and conclusions of law in support of the injunction. This lawsuit, the court explained, challenges Proposition 209's prohibition against race and gender preferences, not its prohibition against discrimination. Plaintiffs' constitutional challenge is "only to that slice of the initiative that now prohibits governmental entities at every level from taking voluntary action to remediate past and present discrimination through the use of constitutionally permissible race- and gender-conscious affirmative action programs." *Id.* at 1489.

The elimination of such programs, the district court found, would reduce opportunities in public contracting and employment for women and minorities. It further would cause enrollment of African-American, Latino, and American Indian students in public colleges to fall, though enrollment of Asian-American students would increase. Finally, the court found that minorities and women, to reinstate race-based or gender-based preferential treatment, would have to re-amend the California Constitution by initiative.

From these findings of fact the district court concluded, first, that plaintiffs have demonstrated a likelihood of success on their equal protection claim. Proposition 209, the court reasoned, has a racial and gender focus which imposes a substantial political burden on the interests of women and minorities. The court held that *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), and *Washington v. Seattle School District No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982), prohibit such treatment of racial and gender issues in the political process.

The district court concluded, second, that plaintiffs have also demonstrated a likelihood of success on their pre-emption claims. Title VII, the court reasoned, preserves the discretion of public employers voluntarily to use race and gender preferences. To the extent that Proposition 209 bans such preferences statewide, the court held that Title VII pre-empts it under the Supremacy Clause.

The district court next explained that plaintiffs would suffer irreparable harm if Proposition 209 takes effect. If not enjoined, Proposition 209 immediately would ban existing preference programs in violation of plaintiffs' constitutional rights. The State, in contrast, the court concluded, would suffer little hardship from a preliminary injunction, which merely would suspend implementation of Proposition 209 pending trial.

Finally, the district court believed that a preliminary injunction would serve the public interest. Preserving the pre-election status quo would "harmonize" the public need for "clear guidance with respect to Proposition 209" with "the compelling interest in remedying discrimination that underlies existing constitutionally-permissible state-sponsored affirmative action programs threatened by Proposition 209."[4] *Coalition*, 946 F.Supp. at 1520.

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[4] The district court deemed it "appropriate to waive the bond requirement" of Federal Rule of Civil Procedure 65(c) in this case. *Coalition*, 946 F.Supp. at 1521 n. 54. We need not address whether the district court erred by failing to require plaintiffs to post a bond in light of our conclusion on the merits. We note, however, that Rule 65(c) provides that "[n]o . . . preliminary injunction shall issue except upon the

C

On December 31, 1996, Californians Against Discrimination and Preferences ("CADP"), the defendant/intervenor, applied to the district court for a stay of the preliminary injunction pending appeal. The State joined in the application. CADP and the State also filed notices of appeal to this court on January 3, 1997, and subsequently moved to stay the district court's injunction pending appeal pursuant to Federal Rule of Appellate Procedure 8. The district court entered its order declining to stay the injunction on February 7, 1997. On February 10, 1997, we heard oral argument on the application to us for a stay. The parties' arguments for and against a stay pending appeal focused primarily on the merits underlying the preliminary injunction itself. We thus deferred submission of the stay application and expedited submission on the merits,[5] which we now decide.

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giving of security by the applicant . . . for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Fed.R.Civ.P. 65; *see generally New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S.Ct. 359, 363, 54 L.Ed.2d 439 (1977) (Opinion of Rehnquist, Circuit Justice, granting stay of injunction) (noting "that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury").

[5] The practice of this Circuit, made explicit in *Gregorio T. v. Wilson*, 54 F.3d 599 (9th Cir.1995), is that the panel to which a motion to stay or to expedite an appeal from a preliminary injunction is referred may retain jurisdiction over the merits of the appeal itself. The panel that decided *Gregorio T.* had been referred motions to stay, to consolidate, and to expedite appeals from a preliminary injunction against the implementation and enforcement of California voter initiative Proposition 187. The

II

Before reaching the merits of the preliminary injunction, we pause to consider whether this case even belongs in federal court. No California state court has yet construed the meaning or effect of Proposition 209. Rather, plaintiffs ask a federal tribunal to enjoin flat-out this state constitutional amendment passed by a majority of the voters.[6] The district court remarked that the issue in this

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Gregorio T. panel, citing the priority and expedited decision that we must give appeals from preliminary injunctions under 28 U.S.C. § 1957 and Ninth Circuit Rule 3-3 (effective July 1, 1995), retained jurisdiction over the merits of the appeals. *Id.* at 600; *see Gregorio T. v. Wilson*, 59 F.3d 1002 (9th Cir.1995). Pursuant to *Gregorio T.*, we likewise retained jurisdiction over the merits of these appeals, which, similarly, challenge a preliminary injunction against the implementation and enforcement of a California voter initiative.

[6] The district court concluded that plaintiffs have standing to bring this suit, which the State does not challenge on appeal. The court found (1) that Proposition 209 would injure plaintiffs by eliminating programs that benefit them; (2) that the injury would result from the State's enforcement of Proposition 209; and (3) that a declaration that Proposition 209 is unconstitutional and an injunction against its enforcement would redress the plaintiffs' alleged injuries. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Plaintiffs, conversely, argue that we must dismiss this appeal because under *Arizonans for Official English v. Arizona*, ___ U.S. ___, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997), CADP had no standing to pursue a stay or an appeal. The Supreme Court expressed "grave doubts" in *Arizonans* whether the proponents of Arizona's "English only" initiative had "standing under Article III to pursue appellate review." *Id.* at ___, 117 S.Ct. at 1068. The issue, however, was one that the Court need not "definitively resolve" because the plaintiff herself lacked

case is not "whether one judge can thwart the will of the people; rather, the issue is whether the challenged enactment complies with our Constitution and Bill of Rights." *Coalition*, 946 F.Supp. at 1490.

No doubt the district court is correct, at least in theory. Judges apply the law; they do not sua sponte thwart wills. If Proposition 209 affronts the federal Constitution – the Constitution which the people of the United States themselves ordained and established – the district judge merely reminds the people that they must govern themselves in accordance with principles of their own choosing. If, however, the district judge relies on an erroneous legal premise, the decision operates to thwart the will of the people in the most literal sense: What the people of California willed to do is frustrated on the basis of principles that the people of the United States neither ordained nor established. A system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy.

The Supreme Court recently reminded federal judges that we should not even undertake to review the constitutionality of a state law without first asking: "Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, ___ U.S. ___, ___, 117 S.Ct. 1055, 1072, 137 L.Ed.2d 170 (1997). As a general rule, federal courts "ought not to consider the Constitutionality of a state

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standing. We likewise need not definitively resolve this issue. Regardless of whether CADP has standing to appeal or seek a stay, there is no question that the State had standing to pursue both.

statute in the absence of a controlling interpretation of its meaning and effect by the state courts." *Id.* (quoting *Poe v. Ullman*, 367 U.S. 497, 526, 81 S.Ct. 1752, 1768, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting)). Justice Ginsburg emphasized for a unanimous court that "[w]hen anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of that core question." *Id.* "Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Id.* at ___, 117 S.Ct. at 1074.

The ink on Proposition 209 was barely dry when plaintiffs filed this lawsuit. For this federal tribunal to tell the people of California that their one-day-old, never-applied-law violates the Constitution, we must have more than a vague inkling of what the law actually does. Plaintiffs challenge Proposition 209 to the extent that it eliminates "affirmative action." A California court that considered Proposition 209's pre-enactment ballot title and ballot label remarked that the term "affirmative action" is an "amorphous, value-laden term," "rarely defined so as to form a common base for intelligent discourse." *Lungren v. Superior Court*, 48 Cal.App.4th 435, 55 Cal.Rptr.2d 690, 694 (1996) (internal ellipses and citation omitted). "Most definitions of the term would include not only the conduct which Proposition 209 would ban, i.e., discrimination and preferential treatment, but also other efforts such as outreach programs." *Id.*

The district court properly limited its use of the term "affirmative action" to state programs that use race or gender classifications.[7] It enjoined Proposition 209 only to the extent that it eliminates programs that grant preferential treatment to individuals on the basis of their race or gender. The court cited as examples programs that would prefer contractors of a certain race or gender in the evaluation of bids for public contracts, programs that would prefer prospective employees of a certain race or gender for public employment, and programs that would prefer prospective students of a certain race or gender for public education or financial aid. Unlike in *Arizonans*, the State does not dispute that Proposition 209 operates to eliminate such programs.[8] Quite the contrary, the district court found that Defendant/Appellant Pete Wilson, Governor

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[7] Plaintiffs apparently do not feel the same constraints. They argue, for example, that we must affirm the injunction because "[t]he remedy for intentional discrimination often calls for race-specific relief." *Coral Constr. Co. v. King County*, 941 F.2d 910, 920 (9th Cir.1991). But "race-specific relief" is hardly synonymous with "preferential treatment on the basis of race." A state may "eradicate racial discrimination" in many ways that do not involve racial preferences. When, for example, a state gives the *identified* victims of state discrimination jobs or contracts that were wrongly denied them, the beneficiaries are not granted a preference "on the basis of their race" but on the basis that they have been individually wronged.

[8] The district court denied the State's motion to abstain pursuant to *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), after the preliminary injunction issued because, among other things, the State did not dispute that Proposition 209 prohibits some race and gender preference programs.

of California, issued an Executive Order on November 6, 1996, implementing Proposition 209 to do just that.

Without this factual basis, we would not hesitate to remand to the district court for reconsideration of the State's abstention motion in light of *Arizonans*. From the district court's findings, however, we are satisfied, to answer the Supreme Court's question, that "yes – this conflict really is necessary." We may now address the merits.

III

A preliminary injunction may issue "if the movant has shown either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the movant's favor." *Armstrong v. Mazurek*, 94 F.3d 566, 567 (9th Cir.1996) (citation omitted). We review an order granting a preliminary injunction for an abuse of discretion. *Los Angeles Mem'l Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir.1980).

An abuse of discretion occurs if the district court "bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1062 (9th Cir.1995) (citation omitted). We review the legal issues underlying a decision to grant an injunction de novo, as well as the conclusion that plaintiffs are likely to succeed on the merits of those issues.[9] *International Molders' and*

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[9] Plaintiffs contend, as an initial matter, that we have no authority to review the "underlying merits" of the preliminary injunction that the district court entered. Plaintiffs are correct to the extent that we will not reverse a preliminary injunction just

Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 551 (9th Cir.1986).

In granting the preliminary injunction, the district court first concluded that plaintiffs have demonstrated a likelihood of success on their claim that Proposition 209 violates the Equal Protection Clause of the Fourteenth Amendment. We must examine whether the district court's conclusion is based on an erroneous legal premise as a matter of "conventional" equal protection analysis, which looks to the substance of the law at issue, or as a

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because we would have arrived at a different result if we had applied the law to the facts of the case. *Sports Form, Inc. v. United Press Int'l*, 686 F.2d 750, 752 (9th Cir.1982); *see also Associated Gen. Contractors of Cal. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1419 (9th Cir.1991) (O'Scannlain, J. concurring) (pointing out that detailed discussion of statistical evidence to determine constitutionality is inappropriate to determine constitutionality on appellate review of preliminary injunction), *cert. denied*, 503 U.S. 985, 112 S.Ct. 1670, 118 L.Ed.2d 390 (1992). Where, as here, however, the issue is whether the district court "misapprehended the law with respect to the underlying issues in litigation," *Sports Form*, 686 F.2d at 752 (citations omitted), we assuredly may assess whether the district court got the law right. *See Glick v. McKay*, 937 F.2d 434, 436 (9th Cir.1991) (explaining that where facts established or of no controlling relevance, constitutional issue subject to "plenary" review); *Nelson*, 799 F.2d at 550 n. 1 (explaining that abuse of discretion will be found if district court "applied incorrect substantive law") (citation omitted).

The parties to this appeal dispute whether the district court relied on an erroneous legal standard, not whether the district court wrongly applied the right legal standard to the facts of the case. Where the issue is whether the district court got the law right in the first place, we do not defer review and thereby allow lawsuits to proceed on potentially erroneous legal premises.

matter of "political structure" equal protection analysis, which looks to the level of government at which the law was enacted. We shall apply each mode of analysis to Proposition 209 in turn.

IV

As a matter of "conventional" equal protection analysis, there is simply no doubt that Proposition 209 is constitutional. The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The central purpose of the Equal Protection Clause "is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976). The Fourteenth Amendment forbids such conduct on the principle that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943). Racial distinctions "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw v. Reno*, 509 U.S. 630, 643, 113 S.Ct. 2816, 2824, 125 L.Ed.2d 511 (1993) (citations omitted).

The ultimate goal of the Equal Protection Clause is "to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 1881-82, 80 L.Ed.2d 421 (1984) (citation and footnote omitted). Therefore, "whenever the government treats any person unequally because of his or her

race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand Constructors v. Pena*, ___ U.S. ___, ___, 115 S.Ct. 2097, 2114, 132 L.Ed.2d 158 (1995). The Equal Protection Clause also protects against classifications based on gender. "Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court . . . has carefully inspected official action that closes a door or denies opportunity to women (or to men)." *United States v. Virginia*, ___ U.S. ___, ___, 116 S.Ct. 2264, 2275, 135 L.Ed.2d 735 (1996) (internal footnote and citation omitted).

The standard of review under the Equal Protection Clause does not depend on the race or gender of those burdened or benefited by a particular classification. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494, 109 S.Ct. 706, 722, 102 L.Ed.2d 854 (1989) (plurality opinion). When the government prefers individuals on account of their race or gender, it correspondingly disadvantages individuals who fortuitously belong to another race or to the other gender. "Consistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race." *Adarand*, ___ U.S. at ___, 115 S.Ct. at 2114. Proposition 209 amends the California Constitution simply to prohibit state discrimination against or preferential treatment to any person on account of race or gender. Plaintiffs charge that this ban on unequal treatment denies members of certain races and one gender equal protection of the laws. If merely stating this alleged equal protection violation does not

suffice to refute it, the central tenet of the Equal Protection Clause teeters on the brink of incoherence.

The Equal Protection Clause guarantees that the government will not classify individuals on the basis of impermissible criteria. Most laws, of course – perhaps all – classify individuals one way or another. Individuals receive, or correspondingly are denied, governmental benefits on the basis of income, disability, veteran status, age, occupation and countless other grounds. Legislative classifications as a general rule are presumptively valid under the Equal Protection Clause. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985). A legislative classification will deny equal protection only if it is not "rationally related to a legitimate state interest." *Id.* (citations omitted).

The general rule does not apply, however, when a law classifies individuals by race or gender. Any governmental action that classifies persons by race is presumptively unconstitutional and subject to the most exacting judicial scrutiny. *Adarand*, ___ U.S. at ___, 115 S.Ct. at 2114. To be constitutional, a racial classification, regardless of its purported motivation, must be narrowly tailored to serve a compelling governmental interest, an extraordinary justification. *See, e.g., Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 277-78, 106 S.Ct. 1842, 1848-49, 90 L.Ed.2d 260 (1986) (plurality opinion). When the government classifies by gender, it must demonstrate that the classification is substantially related to an important governmental interest, requiring an "exceedingly persuasive"

justification.[10] *Cleburne*, 473 U.S. at 441, 105 S.Ct. at 3255; *see Virginia*, ___ U.S. at ___, 116 S.Ct. at 2275.

The first step in determining whether a law violates the Equal Protection Clause is to identify the classification that it draws. Proposition 209 provides that the State of California shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race or gender. Rather than classifying individuals by race or gender, Proposition 209 *prohibits* the State from classifying individuals by race or gender. A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender. Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense.

V

As a matter of "political structure" analysis, however, plaintiffs challenge the level of government at which the State of California has prohibited race and gender preferences. Plaintiffs contend, along with the United States as amicus curiae, that Proposition 209 imposes an unequal "political structure" that denies women and minorities a right to seek preferential treatment from the lowest level of government. The district court agreed, relying on the so-called *"Hunter"* doctrine.

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[10] Proposition 209 contains a savings clause providing that "[n]othing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting." Cal. Const. art. 1, § 31(c).

A

In *Hunter v. Erickson*, the Supreme Court addressed the constitutionality of an amendment to the Charter of the City of Akron, Ohio. Before the charter amendment was enacted, the Akron City Council had authority to pass ordinances regulating the real estate market. *Hunter*, 393 U.S. at 390, 89 S.Ct. at 560. Most ordinances became effective thirty days after the Council passed them. *Id.* The charter amendment operated to prevent the city council from enacting ordinances addressing racial discrimination in housing without majority approval of the Akron voters. *Id.* at 387, 89 S.Ct. at 558-59. The plaintiff, Nellie Hunter, who wanted a fair housing ordinance enforced, claimed that the amendment violated her right to equal protection of the laws.

The Supreme Court found in the charter amendment "an explicitly racial classification treating racial housing matters differently from other racial and housing matters." *Id.* at 389, 89 S.Ct. at 560. The law disadvantaged those who would benefit from laws barring racial discrimination in the real estate market as against those who would benefit from other regulations of the real estate market. *Id.* at 390-91, 89 S.Ct. at 560-61. Absent a compelling state interest, the state "may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id* at 393, 89 S.Ct. at 561.

The Court later applied these principles to Washington State's educational decisionmaking structure in *Washington v. Seattle School District No. 1.* A statewide initiative

in Washington barred school boards from assigning students beyond their neighborhood schools. The initiative contained several broad exceptions, which effectively operated to preclude only desegregative busing. *Seattle*, 458 U.S. at 462-63, 102 S.Ct. at 3190-91. Certain school districts challenged the initiative under the Equal Protection Clause. *Id.* at 464, 102 S.Ct. at 3191-92.

As in *Hunter*, the Court determined that the initiative effected a racial classification by removing "the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* at 474, 102 S.Ct. at 3197. The initiative had restructured the State's educational decisionmaking process to differentiate "between the treatment of problems involving racial matters and that afforded other problems in the same area." *Id.* at 480, 102 S.Ct. at 3200 (internal quotation marks and citation omitted). That differentiation burdened minority interests "by lodging decisionmaking authority over the question at a new and remote level of government." *Id.* at 483, 102 S.Ct. at 3202. Absent a compelling state interest, the initiative's unequal reordering of authority of school boards violated the Equal Protection Clause. *Id.* at 485-86, 102 S.Ct. at 3202-03.

The district court applied *Hunter* and *Seattle* to invalidate Proposition 209. Proposition 209, the court found, effected a race and gender classification by singling out race and gender preferences for unique political burdens. The court concluded that race and gender preferences, like antidiscrimination laws and integrative busing, are of special interest to minorities and women. Before Proposition 209 was enacted, the court reasoned, women and

minorities could petition local government for preferential treatment. To obtain preferential treatment now, the court concluded, women and minorities must appeal to the statewide electorate, a "new and remote level of government."

The district court next analyzed whether the classifications it gleaned from Proposition 209 withstood "heightened scrutiny." The court concluded that the classifications served no important government interest, let alone a compelling one, thus denying women and minorities equal protection of the laws.

B

The State contends that the district court's conclusion rests on an erroneous legal premise because Proposition 209, unlike the *Hunter* and *Seattle* initiatives, does not reallocate political authority in a discriminatory manner. CADP contends, additionally, that a majority of the electorate cannot restructure the political process to discriminate against itself. We address the second contention first.

1

Can a statewide ballot initiative deny equal protection to members of a group that constitutes a majority of the electorate that enacted it? Plaintiffs allege that Proposition 209 places procedural burdens in the path of women and minorities, who together constitute a majority of the California electorate. Is it possible for a majority of voters impermissibly to stack the political deck against

itself? The Supreme Court leaves us, quite frankly, a little perplexed as to the answer.

The "political structure" equal protection cases, namely *Hunter* and *Seattle*, addressed the constitutionality of political obstructions that majorities had placed in the way of minorities to achieving protection against unequal treatment. *Hunter*, holding that the Akron amendment denied minorities equal protection of the laws, observed that "[t]he majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." *Hunter*, 393 U.S. at 391, 89 S.Ct. at 560. *Seattle* addressed a political structure held "to place special burdens on the ability of minority groups to achieve beneficial legislation." *Seattle*, 458 U.S. at 467, 102 S.Ct. at 3193. In *Romer v. Evans*, ___ U.S. ___, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), the most recent "political structure" case, Colorado's Amendment 2 left homosexuals to "obtain specific protection against discrimination only by enlisting the citizenry of Colorado." *Id.* at ___, 116 S.Ct. at 1627. It would seem to make little sense to apply "political structure" equal protection principles where the group alleged to face special political burdens itself constitutes a majority of the electorate.

The difficulty, however, lies in reconciling what seems to be that eminently sensible conclusion with the principle that the Fourteenth Amendment guarantees equal protection to individuals and not to groups. That the Fourteenth Amendment affords individuals, not groups, the right to demand equal protection is a fundamental first principle of "conventional" equal protection jurisprudence. *Adarand*, ___ U.S. at ___, 115 S.Ct. at 2111. The Equal Protection Clause, after all, prohibits a state

from denying "to any *person* within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1 (emphasis added).

Where a state denies someone a job, an education, or a seat on the bus because of her race or gender, the injury to that individual is clear. The person who wants to work, study, or ride but cannot because she is black or a woman is denied equal protection. Where, as here, a state prohibits race or gender preferences at any level of government, the injury to any specific individual is utterly inscrutable. No one contends that individuals have a constitutional right to preferential treatment solely on the basis of their race or gender. Quite the contrary. What, then, is the personal injury that members of a group suffer when they cannot seek preferential treatment on the basis of their race or gender from local government? This question admits of no easy answer.

Hunter and *Seattle* suggest that the political structures they held unconstitutional imposed individual injuries analogous to "denying [members of a racial minority] the vote, on an equal basis with others."[11] *Seattle*, 458 U.S. at 470, 102 S.Ct. at 3195 (quoting *Hunter*, 393 U.S. at 391, 89 S.Ct. at 561). When the electorate votes up or down on a referendum alleged to burden a majority of the voters, it is hard to conceive how members of the majority have been denied the vote. If members of a majority somehow

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[11] In the voting rights cases *Hunter* cited, *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and *Avery v. Midland Co.*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), each individual was denied his or her right to a vote of substantially equal weight to the vote of other residents.

can deny their own right to ask local government for racial preferences, conceivably a statewide referendum *affording* preferential treatment to racial minorities would deny members of the racial majority the right to ask local governments to abolish racial preferences. "Consistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be." *Adarand*, ___ U.S. at ___, 115 S.Ct. at 2114.

Thankfully, the absence of any specific findings by the district court in this regard relieves us from having to reconcile "the long line of cases understanding equal protection as a personal right," *Id.*, with *Hunter*'s admonition that "the majority needs no protection against discrimination," *Hunter*, 393 U.S. at 391, 89 S.Ct. at 560.[12] Our task in this case is merely to determine whether the district court relied on an erroneous legal premise. We accept without questioning the district court's findings that Proposition 209 burdens members of insular minorities within the majority that enacted it who otherwise

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[12] This admonition seems to perceive the right to equal protection as a group right rather than an individual right, which the Supreme Court later denounced in *Croson* and *Adarand*. When we attribute equal protection rights to groups rather than to individuals, "[i]t reinforces the perception that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes." *Shaw*, 509 U.S. at 647, 113 S.Ct. at 2827.

would seek to obtain race-based and gender-based preferential treatment from local entities.[13] The legal question for us to decide is whether a burden on achieving race-based or gender-based preferential treatment can deny individuals equal protection of the laws.

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[13] CADP's argument that *Hunter* and *Seattle* do not extend to gender-based laws because women themselves constitute a majority of the electorate is, nonetheless, compelling. Had the parties presented evidence, and had the district court found, that women constitute a majority of the California electorate, we likely would conclude as a matter of law, for that reason alone, that Proposition 209's ban on gender-based preferences does not deny women equal protection. By so concluding, to be sure, we would bring to a head the tension between the protection that the "political structure" cases afford to the "ability of minority groups to achieve beneficial legislation," *Seattle*, 458 U.S. at 467, 102 S.Ct. at 3193, and the "fundamental principle of equal protection as a personal right." *Adarand*, ___ U.S. at ___, 115 S.Ct. at 2117. On the one hand, "[t]he majority needs no protection against discrimination," *Hunter*, 393 U.S. at 391, 89 S.Ct. at 560, but, on the other, the Equal Protection Clause protects the individual members of the majority, not the majority as a group. Caught in the cross-fire of seemingly irreconcilable Supreme Court precedent, we would deem it better to err on the side of common sense. To hold that women as a majority could impose a political structure that denied themselves equal protection of the laws would subject to "political structure" scrutiny any state law that imposed benefits on those that shared a minority trait (e.g. veterans), with corresponding burdens on those that shared a majority trait (e.g. the non-veterans). Such a revolutionary concept is inimical to a constitutional scheme founded on democratic self-government.

The Supreme Court has recognized an explicit distinction "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters." *Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527, 538, 102 S.Ct. 3211, 3218, 73 L.Ed.2d 948 (1982). The former denies persons against whom the law discriminates equal protection of the laws; the latter does not. Into which category Proposition 209 falls we must now determine.

In *Crawford*, the Supreme Court considered an amendment to the California Constitution that prohibited state courts from mandating pupil assignment or transportation except to remedy a specific equal protection violation. *Id.* at 532, 102 S.Ct. at 3215. Minority students had alleged that the amendment employed a racial classification that burdened minorities who sought to vindicate state-created rights. *Id.* at 536, 102 S.Ct. at 3217. The Supreme Court disagreed, holding that the amendment did not employ a racial classification. Unlike the charter amendment in *Hunter*, "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Id.* at 539, 102 S.Ct. at 3218.

Crawford, thus, on the one hand, dictates that "the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place." *Id.* at 538, 102 S.Ct. at 3218. *Hunter* and *Seattle*, on the

other hand, prohibited states from placing decisionmaking authority over certain racial issues at higher levels of government.

Plaintiffs attempt to align Proposition 209 with *Hunter* and *Seattle* and distinguish it from *Crawford*. *Crawford*, they argue, addressed an amendment that merely repealed a benefit that the state itself had afforded, not the authority of local subdivisions to afford the same benefit. *Hunter* and *Seattle*, in their view, foreclose the authority of states to withdraw local jurisdiction to enact race and gender preferences unless the state also withdraws local jurisdiction to enact preferences based on any other criteria. Such an extraordinary proposition hardly follows from *Hunter* and *Seattle*.

a

The *Hunter* doctrine "does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible classification." *Seattle*, 458 U.S. at 485, 102 S.Ct. at 3203. Rather, for the doctrine to apply at all, the state somehow must reallocate political authority in a discriminatory manner.

States have "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71, 99 S.Ct. 383, 390, 58 L.Ed.2d 292 (1978).[14] That a law resolves an issue at a higher level

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[14] *See Williams v. Mayor*, 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015 (1933) ("A municipal corporation, created by a state

of state government says nothing in and of itself. Every statewide policy has the "procedural" effect of denying someone an inconsistent outcome at the local level. "[A] lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group." *James v. Valtierra*, 402 U.S. 137, 142, 91 S.Ct. 1331, 1334, 28 L.Ed.2d 678 (1971).

Hunter and *Seattle* relied expressly on the states' existing educational and housing decisionmaking processes to find that they had reallocated authority in a racially discriminatory manner. In *Hunter*, the state obstructed equal housing by removing only racially fair housing prerogatives from the lawmaking procedure for all other housing matters. In *Seattle*, the state obstructed equal education by removing only racially desegregative prerogatives from the lawmaking procedure for all other educational matters.

As the *Seattle* Court explained:

> Before adoption of the initiative, the power to determine what programs would most appropriately fill a school district's educational needs

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for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."); *Hunter v. Pittsburgh*, 207 U.S. 161, 178, 28 S.Ct. 40, 46, 52 L.Ed. 151 (1907) ("The number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.").

> – including programs involving student assignment and desegregation – was firmly committed to the local board's discretion. The question whether to provide an integrated learning environment rather than a system of neighborhood schools surely involved a decision of that sort. After passage of Initiative 350, authority over all but one of those areas remained in the hands of the local board. By placing power over desegregative busing at the state level, then, Initiative 350 plainly differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area.

Seattle, 458 U.S. at 479-80, 102 S.Ct. at 3200 (internal quotation marks and citations omitted). Plaintiffs would have us extrapolate from *Seattle* that a state may never treat race *qua* race differently from any other legal classification. *Seattle* itself, however, declined that invitation.

The *Seattle* majority specifically allayed any concern that its holding rendered the state powerless to address racial issues where localities acted first. Justice Powell had lamented in dissent what a "strange notion" it was, "alien to our system – that local governmental bodies can forever preempt the ability of a State – the sovereign power – to address a matter of compelling concern to the State." *Id.* at 495, 102 S.Ct. at 3208 (Powell, J., dissenting). He questioned how a statewide repeal of busing created a racial classification when identical action by the local government would not. *Id.* at 494, 102 S.Ct. at 3207-08 (Powell, J., dissenting). To him, the decision left "unclear whether the State may set policy in any area of race relations where a local governmental body arguably has done 'more' than the Fourteenth Amendment requires."

Id. at 498 n. 14, 102 S.Ct. at 3210 n. 14 (Powell, J., dissenting).

The majority responded that the "horribles paraded by the dissent" in footnote 14 were "entirely unrelated to this case." *Id.* at 480 n. 23, 102 S.Ct. at 3200 n. 23. The *Seattle* majority did not question "that the State might have vested all decisionmaking authority in itself." *Id.* at 477, 102 S.Ct. at 3198; *see id.* at 480 n. 23, 102 S.Ct. at 3200 n. 23. The State's prerogative in that regard was "irrelevant" in *Seattle*, though, because "the political structure it in fact erected impose[d] comparative burdens on minority interests. . . . " *Id.* at 477, 102 S.Ct. at 3198. The State, of course, "could have reserved to state officials the right to make all decisions in the areas of education and student assignment." *Id.* at 487, 102 S.Ct. at 3204. Conversely, the State had "not attempted to reserve to itself exclusive power to deal with racial issues generally."[15] *Id.* at 479 n. 22, 102 S.Ct. at 3200 n. 22. By removing desegregative prerogatives from these general grants of power, the State, as in *Hunter*, differentiated the treatment of racial problems in education from that afforded educational and racial issues generally.

When, in contrast, a state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender, it has promulgated a law that addresses in neutral-fashion race-related and gender-related matters. It does not isolate race or gender antidiscrimination laws from any specific

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[15] Rather, the State had given its municipalities "the power to enact antidiscrimination ordinances." *Seattle*, 458 U.S. at 479 n. 22, 102 S.Ct. at 3199 n. 22.

area over which the state has delegated authority to a local entity. Nor does it treat race and gender antidiscrimination laws in one area differently from race and gender antidiscrimination laws in another. Rather, it prohibits all race and gender preferences by state entities.

b

Even a state law that does restructure the political process can only deny equal protection if it burdens an individual's right to equal treatment.

A denial of equal protection entails, at a minimum, a classification that treats individuals unequally. *See, e.g., Adarand,* ___ U.S. at ___, 115 S.Ct. at 2111. The "political structure" cases do not create some paradoxical exception to this *sine qua non* of any equal protection violation. In *Hunter,* the lawmaking procedure made it more difficult for Nellie Hunter to obtain protection against unequal treatment in the housing market. In *Seattle,* the lawmaking procedure made it more difficult for minority students to obtain protection against unequal treatment in education.[16] In *Romer,* Colorado's Amendment 2 denied

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[16] The district court perceived no relevant difference between the busing programs at issue in *Seattle* and the racial preference programs at issue here. We have recognized, however, that " 'stacked deck' programs [such as race-based 'affirmative action'] trench on Fourteenth Amendment values in ways that 'reshuffle' programs [such as school desegregation] do not." *Associated Gen. Contractors of Cal. v. San Francisco Unified Sch. Dist.,* 616 F.2d 1381, 1387 (9th Cir.), *cert. denied,* 449 U.S. 1061, 101 S.Ct. 783, 66 L.Ed.2d 603 (1980). Unlike racial preference programs, school desegregation programs are not inherently invidious, do not work wholly to the benefit of

homosexuals the ability to obtain "protection against discrimination," thus classifying homosexuals "not to further a proper legislative end but to make them unequal to everyone else." *Romer*, ___ U.S. at ___, 116 S.Ct. at 1629.

Plaintiffs challenge Proposition 209 not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment. The controlling words, we must remember, are "equal" and "protection." Impediments to preferential treatment do not deny equal protection.[17] It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment. While the

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certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights. *Id.*

[17] We must be sure not to misread the district court's finding that those seeking race or gender preferences now must mount a statewide campaign while "those seeking preferences based on any ground other than race or gender, such as age, disability, or veteran status, continue to enjoy access to the political process at all levels of government." Proposition 209 only prohibits preferential treatment based on race or gender. "Those seeking preferences based on any ground other than race or gender, such as age, disability, or veteran status," who "continue to enjoy access to the political process at all levels of government," include, we must remember, everyone – members of all races and both genders. If the state ever prohibited women and minorities from seeking preferences on a basis available to everyone else, such as age, disability, or veteran status, the state would violate Proposition 209's prohibition against race or gender discrimination.

Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms.

The alleged "equal protection" burden that Proposition 209 imposes on those who would seek race and gender preferences is a burden that the Constitution itself imposes. The Equal Protection Clause, parked at our most "distant and remote" level of government, singles out racial preferences for severe political burdens – it prohibits them in all but the most compelling circumstances. It is well-settled that "all governmental action based on race – a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited – should be subject to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Adarand*, ___ U.S. at ___-___, 115 S.Ct. at 2112-13 (internal quotation marks and citation omitted). That is because "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at ___, 115 S.Ct. at 2112 (quoting *Croson*, 488 U.S. at 493, 109 S.Ct. at 721, 102 L.Ed.2d 854 (1989) (plurality)). Rather, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Id.* at ___, 115 S.Ct. at 2111. A governmental action that classifies persons on the basis of gender demands an "exceedingly persuasive justification" to survive constitutional scrutiny. *Virginia*, ___ U.S. at ___, 116 S.Ct. at 2275.

That the Constitution *permits* the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether. States are free to make or not make any constitutionally permissible legislative classification. Nothing in the Constitution suggests the anomalous and bizarre result that preferences based on the most suspect and presumptively unconstitutional classifications – race and gender – must be readily available at the lowest level of government while preferences based on any other presumptively legitimate classification – such as wealth, age or disability – are at the mercy of statewide referenda.

After all, the "goal" of the Fourteenth Amendment, "to which the Nation continues to aspire," is "a political system in which race no longer matters." *Shaw,* 509 U.S. at 657, 113 S.Ct. at 2832. When the people enact a law that says race somehow matters, they must come forward with a compelling state interest to back it up. Plaintiffs would have us also require the people to come forward with a compelling state interest to justify a state law that says that race cannot matter in public contracting, employment, and education. Plaintiffs' counsel went even one step further at oral argument. He urged that "[t]he people of the State of California are not entitled to make a judgment as to whether compelling state interests have been vindicated. That is for the courts." *Au contraire!* That most certainly *is* for the people of California to decide, *not* the courts. Our authority in this area is limited to deciding whether the interests proffered by the people are sufficient to justify a law that classifies among individuals. If the federal courts were to decide what the interests of the people are in the first place, judicial

power would trump self-government as the general rule of our constitutional democracy.

The Constitution permits the people to grant a narrowly tailored racial preference only if they come forward with a compelling interest to back it up. *See, e.g., Adarand*, ___ U.S. at ___, 115 S.Ct. at 2114. "[I]n the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits, and what it requires." *Shaw*, 509 U.S. at 654, 113 S.Ct. at 2830. To hold that a democratically enacted affirmative action program is constitutionally permissible because the people have demonstrated a compelling state interest is hardly to hold that the program is constitutionally required. The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.

A state law that prohibits classifications based on race or gender is a law that addresses in neutral-fashion race-related and gender-related matters. As in *Crawford*, "[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it."[18] *Crawford*, 458 U.S. at 535, 102 S.Ct. at 3217. For these reasons, we are persuaded that the district court relied on

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[18] To the extent that Proposition 209 prohibits race and gender preferences to a greater degree than the Equal Protection Clause, it provides greater protection to members of the gender and races otherwise burdened by the preference. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741 (1980) (noting a state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution").

an erroneous legal premise when it concluded that plaintiffs have demonstrated a likelihood of success on their equal protection claim.

VI

The district court also concluded that plaintiffs have demonstrated a likelihood of success on their claim that Proposition 209 is invalid under the Supremacy Clause because Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*, pre-empts it.[19] The district court found Title VII to be "silent" on "the role of voluntary race- and gender-conscious affirmative action" under its schema. It thus turned, pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), to an interpretation of the statute by the Equal Employment Opportunity Commission ("EEOC"). An EEOC Guideline states: "Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII." 29 C.F.R. § 1608.1(c). Applying *Chevron*, the court gave "substantial deference" to this interpretation of the statute.

The district court is correct that federal law may pre-empt state law to the extent that the state law "stands as an obstacle to the accomplishment and execution of the

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[19] The district court also found that Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, did not pre-empt it. Plaintiffs do not contend otherwise on appeal.

full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).[20] The district court apparently overlooked, however, the express pre-emption provisions of the 1964 Civil Rights Act.[21] "In two sections of the 1964 Civil Rights Act, §§ 708 and 1104, Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987) (plurality opinion).

Section 708 of Title VII provides:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present of [sic] future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-7. That is all Title VII pre-empts. Proposition 209 does not remotely purport to require the doing of any act which would be an unlawful employment

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[20] Plaintiffs raise no claim of field pre-emption, which, as the district court noted, does not apply. The district court also rejected plaintiffs pre-emption claim on the ground that "compliance with both federal and state regulation is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963).

[21] In light of the express pre-emption provisions and plain language of Title VII, we do not reach the question of whether EEOC guidelines, as opposed to regulations, merit *Chevron* deference.

practice under Title VII. Quite the contrary, "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). Title VII, therefore, does not pre-empt Proposition 209.

Section 1104 of Title XI also generally limits the pre-emptive effect of all titles of the Civil Rights Act:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. § 2000h-4.

Section 1104's more general pre-emption provisions would operate to pre-empt Proposition 209 only if Proposition 209 were inconsistent with any purpose or provision of the 1964 Civil Rights Act. Title VII's one command regarding race and gender preferences conclusively demonstrates that Proposition 209 is entirely consistent: "Nothing contained in this subchapter shall be interpreted to require any [entity] . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group. . . . " 42 U.S.C. § 2000e-2(j); *see Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259, 101 S.Ct. 1089, 1096, 67 L.Ed.2d 207 (1981) ("Title VII . . . does not demand that an

employer give preferential treatment to minorities or women."). Nothing in Title VII suggests that Congress intended to leave government with less latitude under Title VII than private employers. *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 520 n. 10, 106 S.Ct. 3063, 3074 n. 10, 92 L.Ed.2d 405 (1986).

Because Title VII by its plain language does not pre-empt Proposition 209, the district court relied on an erroneous legal premise in concluding that plaintiffs are likely to succeed on the merits of their pre-emption claims.

VII

With no likelihood of success on the merits of their equal protection or pre-emption claims, plaintiffs are not entitled to a preliminary injunction. The district court determined that plaintiffs had demonstrated irreparable harm because Proposition 209 threatened to inflict an immediate and ongoing constitutional injury upon them. That conclusion, for reasons we have explained, rests on an erroneous legal premise. As we explained in *Glick v. McKay*, 937 F.2d 434 (9th Cir.1991), our review of a constitutional issue is plenary where "the facts are established or of no controlling relevance." *Id.* at 436 (quoting *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 757, 106 S.Ct. 2169, 2177, 90 L.Ed.2d 779 (1986)). Assuming all facts alleged in the complaint and found by the district court to be true, and drawing all reasonable inferences in plaintiffs' favor, we must conclude that, as a matter of law, Proposition 209 does not

violate the United States Constitution. With no constitutional injury on the merits as a matter of law, there is no threat of irreparable injury or hardship to tip the balance in plaintiffs' favor.

For the foregoing reasons, we vacate the preliminary injunction, deny the motion to stay the injunction as moot, and remand to district court for further proceedings consistent with this opinion.

Preliminary injunction VACATED; stay DENIED as moot; REMANDED.

APPENDIX B

COALITION FOR ECONOMIC EQUITY, et al., Plaintiffs,

v.

Pete WILSON, et al., Defendants.

No. C 96-4024 TEH.

United States District Court,

N.D. California.

Dec. 23, 1996.

Class of persons adversely affected by amendment to State Constitution that prohibited government entities from using race- and gender-conscious affirmative action programs sued class of government officials challenging constitutionality of amendment. The District Court, Thelton E. Henderson, Chief Judge, after granting temporary restraining order (TRO) enjoining state officials from implementing the amendment, 1996 WL 691962, considered motion for preliminary injunction, and held that: (1) plaintiff class had standing; (2) *Seattle-Hunter* doctrine, that facially neutral enactments that single out race and gender issues for unique political burdens are suspect classifications under equal protection clause, applied; (3) plaintiff class established likelihood of success on equal protection claim; (4) plaintiff class demonstrated likelihood of success on claim that amendment was preempted as "obstacle" to Title VII; (5) plaintiff class failed to demonstrate likelihood of success on merits of claim that amendment was preempted as obstacle to other civil rights statutes; (6) plaintiff class demonstrated likelihood of imminent irreparable injury; (7) balance of hardships

tipped in favor of plaintiff class; and (8) public interest favored granting of injunction.

Injunction granted.

Edward M. Chen, American Civil Liberties Union, Foundation of Northern CA Inc., San Francisco, CA, Mark D. Rosenbaum, David S. Schwartz, Taylor Flynn, Silvia Argueta, Daniel Tokaji, ACLU Foundation of Southern California, Los Angeles, CA, William C. McNeill, III, Julian A. Gross, Employment Law Center, Legal Aid Society of S.F., San Francisco, CA, Stewart Kwoh, Julie Su, Asian Pacific American Legal Center of Southern CA, Los Angeles, CA, Evan H. Caminker, University of California at Los Angeles, School of Law, Los Angeles, CA, Eva J. Paterson, Theodore Hsien Wang, Lawyers Committee For Civil Rights of San Francisco Bay Area, San Francisco, CA, Julie Goldscheid, Martha F. Davis, NOW Legal Defense and Education Fund, New York, NY, Karl M. Manheim, Loyola Law School, Los Angeles, CA, Abby J. Leibman, California Women's Law Center, Los Angeles, CA, Judith E. Kurtz, Equal Rights Advocates, Inc., San Francisco, CA, Joseph S. Avila, Avila & Putnum, Los Angeles, CA, Elliot M. Mineberg, People For the American Way, Washington, DC, Christopher F. Edley, Jr., Harvard Law School, Cambridge, MA, Brad Seligman, The Impact Fund, Berkeley, CA, for The Coalition for Economic Equity, California NAACP, Northern California NAACP, AFL-CIO, Council of Asian American Business Associations, CA, Chinese American Citizens' Alliance, Women Construction Business Owners and Executives, California Chapter, United Minority Business

Entrepreneurs, Chinese for Affirmative Action, Black Advocates in State Service, Asian Pacific American Labor Alliance, LaVoz Chicana, Black Chamber of Commerce of California, Michelle Bennett, Nancy Burns, Floyd Chavez, Christopher Clay, Dana Cunningham, Iran Celeste Davila, Shevada Dove, Jessica Lopez, Virginia Mosqueda, Salvador Ochoa, Clifford Tong.

Glenn Rothner, Ellen Greenstone, Rothner Segall & Bahan, Pasadena, CA, for California Labor Federation.

Linda Cabatic, CA State Atty. General, Sacramento, CA, for Pete Wilson, Daniel E. Lungren, Joanne Corday Kozberg, James Gomez.

Joseph R. Symkowick, CA State Dept. of Education, Sacramento, CA, Joanne Lowe, Deputy General Counsel, Sacramento, CA, for Delaine Easton.

C. Ellen Pilsecker, Ian Fan, San Diego, CA, for San Diego County.

Victor J. Westman, County Counsel, Martinez, CA, Phillip S. Althoff, Martinez, CA, for Contra Costa County.

Thomas G. Hendricks, County Counsel's Office, San Rafael, CA, for Marin County.

Nicholas George-Rodriguez, Lawrence S. Newberry, Tracy Webb, City Attorney's Office, Pasadena, CA, for City of Pasadena.

Manuel S. Klausner, Kindel & Anderson, Los Angeles, CA, Sharon L. Browne, Mark T. Gallagher, Pacific Legal Foundation, Sacramento, CA, Michael A.

Carvin, Charles J. Cooper, Cooper & Carvin, Pllc., Washington, DC, for Californians Against Discrimination and Preferences, Inc.

Colleen M. Rohan, San Francisco, CA, for Amicus Curiae Meiklejohn Civil Liberties Institute.

Manuel S. Klausner, Kindel & Anderson, Los Angeles, CA, Donna G. Matias, Institute for Justice, Washington, DC, for Amicus Curiae Institute for Justice, Women's Freedom Network, Campaign for a Color-Blind America, Center for Equal Opportunity, U.S. Pan-Asian American Chamber of Commerce Education Foundation, Pacific Research Institute, Center for New Black Leadership, Claremont Institute.

Christopher M. Patti, University Of California, Office of the General Counsel, Oakland, CA, for Richard C. Atkinson.

Tina L. Rasnow, Tina L. Rasnow & Associates, Westlake Village, CA, for Amicus Curiae California Women Lawyers.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE PRELIMINARY INJUNCTION

THELTON E. HENDERSON, Chief Judge.

I. INTRODUCTION

This action presents a challenge to the constitutionality of newly-enacted Article 1, section 31 of the California Constitution. This measure, which appeared on the ballot as Proposition 209, was passed by the California electorate on November 5, 1996. It provides in relevant part as follows:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

CAL. CONST. art. 1, § 31(a).[1]

It is important to note at the outset that much of this language simply reaffirms existing anti-discrimination protections already provided by the United States and California Constitutions, and by the 1964 Civil Rights Act. These laws have long-guaranteed all persons "equal protection of the law," and prohibited discrimination in employment and in any program or activity receiving federal assistance.[2] This aspect of Proposition 209 – which creates no change in existing law – is not at issue in this case. Indeed, it could hardly be more clear that a law that merely affirms the non-discrimination principles in our Constitution is, itself, constitutional.

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[1] For the sake of brevity, the Court will use the term "race" to cover all of the categories identified in Proposition 209 other than sex.

[2] The Fourteenth Amendment and § 7(a) of the California Constitution both provide that no person may be denied "the equal protection of the laws." Titles VI and VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000d-e et seq. prohibit, respectively, discrimination in any project or activity receiving federal financial assistance on the basis of race, and in employment on the basis of race and sex. As the ballot argument in favor of Proposition 209 noted, the initiative "restates the historic Civil Rights Act." Pls. Exh. 2.

It is also undisputed that the Constitution precludes voluntary, government-sponsored race and gender "preferences" except in the most limited circumstances. Thus, government entities were already barred, prior to Proposition 209, from using race-conscious "preferences," e.g. race-conscious affirmative action programs, unless they could pass the most exacting "strict scrutiny" required by the Fourteenth Amendment. Under this test, only those programs that are "*narrowly* tailored" and "*necessary* to break down patterns of *deliberate* exclusion" perpetuated by the enacting agency are permitted. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509, 109 S.Ct. 706, 730, 102 L.Ed.2d 854 (1989) (emphasis added).[3] Quotas are not permitted. *See, e.g., Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). Gender-based programs, under existing law, are also subject to a heightened level of scrutiny. *U.S. v. Virginia*, ___ U.S. ___-___, ___, 116 S.Ct. 2264, 2275, 135 L.Ed.2d 735 (1996).

In short, Congress and the courts had already prohibited discrimination, and sharply constrained government use of race and gender preferences, long before Proposition 209 was enacted on November 5, 1996. The parties do not dispute, however, that the people of California meant to do something more than simply restate existing law

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[3] The city of San Francisco, for example, adopted a race- and gender-conscious affirmative action program after finding that it was necessary to counter established discriminatory practices, including "old boy networks," that prevented minority and women contractors from obtaining city contracts. *Associated Gen. Contractors of Calif. v. Coalition for Economic Equity*, 950 F.2d 1401, 1413-18 (9th Cir.1991).

when they adopted Proposition 209. It is this "something more" that is the focus of this action.

To be sure, the outer boundaries of this "something more" have yet to be determined. It is clear, however, that the primary change Proposition 209 makes to existing law is to close that narrow but significant window that permits the governmental race- and gender-conscious affirmative action programs described above that are still permissible under the United States Constitution. Notably, defendants agreed at oral argument that Proposition 209 prohibits at least some of these constitutionally permissible programs. They also failed to identify any other programs that would be affected by Proposition 209.

It is thus essential to keep in mind that plaintiffs' constitutional challenge to Proposition 209 is not, in fact, a facial challenge to the entire initiative. Rather, it is much narrower in scope: it is a challenge only to that slice of the initiative that now prohibits governmental entities at every level from taking voluntary action to remediate past and present discrimination through the use of constitutionally permissible race- and gender-conscious affirmative action programs.[4]

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[4] We note that while the exact relationship between the terms "affirmative action" and "preferences" has yet to be determined, the following is clear. First, the term "preferences" includes, at a minimum, programs or policies that use racial or gender classifications. Second, the term "affirmative action" is generally understood to include, at a minimum, programs designed to remedy the continuing effects of past and/or present discrimination which contain a race- or gender-conscious component. The term "affirmative action" as used in this decision is intended to refer to such programs. However, to

Plaintiffs assert that this specific aspect of Proposition 209 violates the United States Constitution on two separate grounds. First, they allege that Proposition 209, although couched in neutral terms, violates the Fourteenth Amendment's equal protection guarantee of "the right to full participation in the political life of the community." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 467, 102 S.Ct. 3187, 3193, 73 L.Ed.2d 896 (1982); *see also Romer v. Evans*, ___ U.S. ___, ___, 116 S.Ct. 1620, 1628, 134 L.Ed.2d 855 (1996) ("Central . . . to our own Constitution's guarantee of equal protection is the principle that government in each of its parts remain open on impartial terms to all who seek its assistance."). Proposition 209 violates this guarantee, they argue, because it restructures the political process in a nonneutral manner. Specifically, it erects unique political hurdles only for those seeking legislation intended to benefit women and minorities – who must now obtain a constitutional amendment – while allowing those seeking preferential legislation on any other ground unimpeded access to the political process at all levels.

Second, plaintiffs allege that Proposition 209 violates the Supremacy Clause of the United States Constitution because it interferes with Congress' intent that employers be afforded the option of utilizing constitutionally permissible race- and gender-conscious affirmative action to

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ensure clarity on this point, and because the term "affirmative action" may be used in other contexts to refer to programs that are not race- or gender-conscious, the Court will generally use the longer, but more precise, phrase "race- and gender-conscious affirmative action" to refer to programs affected by Proposition 209.

comply with their obligations under Titles VI and VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972.

The immediate issue before the Court is whether plaintiffs[5] have satisfied their burden of demonstrating that defendants[6] should be preliminarily enjoined from enforcing or implementing Proposition 209 pending a final determination of the merits of this action. In weighing this matter, the Court is mindful that any challenge to a duly-enacted law should be met with caution and restraint. It is not for this or any other court to lightly upset the expectations of the voters. At the same time,

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[5] Pursuant to this Court's Order of November 25, 1996, plaintiffs represent a class of all persons or entities who, on account of race, sex, color, ethnicity, or national origin, are or will be adversely affected by Proposition 209's prohibition of affirmative action programs operated by the State of California, any state or municipal agency, or any other political subdivision or governmental instrumentality of the State of California. The plaintiff class is represented by named plaintiffs Coalition for Economic Equity, California NAACP, Northern California NAACP, California Labor Federation, AFL-CIO, Council of Asian American Business Associations, California Chinese American Citizens' Alliance, California Chapter of the Women Construction Business Owners and Executives, United Minority Business Entrepreneurs, Chinese For Affirmative Action, Black Advocates in State Service, Asian Pacific American Labor Alliance, La Voz Chicana, Black Chamber of Commerce of California, and several named individuals.

[6] Pursuant to this Court's Order of December 16, 1996, defendants represent a class of all state officials, local government entities or other governmental instrumentalities bound by Proposition 209. The defendant class is represented by named defendants Governor Pete Wilson and Attorney General Daniel Lungren.

our system of democracy teaches that the will of the people, important as it is, does not reign absolute but must be kept in harmony with our Constitution.

Thus, the issue is not whether one judge can thwart the will of the people; rather, the issue is whether the challenged enactment complies with our Constitution and Bill of Rights. Without a doubt, federal courts have no duty more important than to protect the rights and liberties of all Americans by considering and ruling on such issues, no matter how contentious or controversial they may be. This duty is certainly undiminished where the law under consideration comes directly from the ballot box and without the benefit of the legislative process. As the Supreme Court aptly noted in another socially-charged case:

> Nor does the implementation of . . . change through popular referendum immunize it [from constitutional scrutiny]. The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.

Hunter v. Erickson, 393 U.S. 385, 392, 89 S.Ct. 557, 561, 21 L.Ed.2d 616 (1969).

It also cannot be overemphasized that this case does not call upon this Court to adjudicate whether affirmative action is right or wrong, or whether it is no longer an appropriate policy for addressing the continuing effects of past and present discrimination against racial minorities and women. Such questions, while they are most certainly of vital public policy interest, lie beyond the purview of this Court. Nor does this case implicate the

ability of governmental entities to voluntarily repeal affirmative action policies, as the Regents of the University of California did earlier this year.

Rather, the substantive issues raised by this action are considerably more narrow, albeit no less important: whether the particular *method* chosen by Proposition 209 to curtail affirmative action is unlawful because it either (1) violates the rights of women and minorities to fully participate in our political system or (2) interferes with Congressional goals embodied in Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.

In the discussion that follows, this Court first addresses the question of whether plaintiffs have standing to bring this action. The Court then turns to the appropriate standard governing plaintiffs' motion for a preliminary injunction, which is followed by this Court's Findings of Fact and Conclusions of Law, with respect to that motion, as required by FED.R.CIV.P. 65.

Based on these Findings and Conclusions, this Court rules that:

(1) Plaintiffs have standing to bring this action.

(2) Plaintiffs have demonstrated a probability of success on their claim that Proposition 209 violates the Fourteenth Amendment's equal protection guarantee to full participation in the political life of the community.

(3) Plaintiffs have failed to demonstrate a likelihood of success on their claim that Proposition 209 violates the Supremacy Clause because it conflicts with, and is thus

preempted by, Title VI of the 1964 Civil Rights Act and Title IX of the Education Amendments of 1972.

(4) Plaintiffs have demonstrated a likelihood of success on their claim that Proposition 209 violates the Supremacy Clause because it conflicts with, and is thus preempted by, Title VII of the 1964 Civil Rights Act.

(5) Plaintiffs have demonstrated that a preliminary injunction is necessary to protect the plaintiff class from the possibility of irreparable injury.

Accordingly, the Court grants plaintiffs' Motion for Preliminary Injunction, and enjoins defendants, pursuant to the injunction following these Findings and Conclusions, from enforcing and implementing Proposition 209 pending trial or final judgment in this action.

II. STANDING

A "threshold question in every federal case [is] whether the plaintiff has stated a 'case or controversy' between himself and the defendant within the meaning of Article III." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The core component of whether a case or controversy under Article III exists is the doctrine of standing. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324-25, 82 L.Ed.2d 556 (1984). The Supreme Court has established three elements necessary to meet the Article III standing requirement. First, the plaintiff must have suffered an "injury in fact" – "[t]he plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' . . . and the injury or threat of injury must be both 'real and

immediate,' not 'conjectural' or 'hypothetical.' " *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983). Second, the injury must be a result of the challenged conduct. *See, e.g. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) ("The injury has to be 'fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court.' "). Finally, a plaintiff must show a likelihood that a favorable decision will redress the injury. *Id.*

Here, defendants assert that none of the plaintiffs shows an imminent threatened injury. Notwithstanding the limitations imposed by article 3, section 3.5 of the California Constitution,[7] however, Proposition 209 is a self-executing amendment to the California Constitution that imposes an affirmative duty to comply. "In this circumstance compliance is coerced by the threat of enforcement, and the controversy is both immediate and real." *Lake Carriers' Association v. MacMullan*, 406 U.S. 498, 508, 92 S.Ct. 1749, 1756, 32 L.Ed.2d 257 (1972).

Plaintiffs have shown a real and immediate threat of injury. Proposition 209 is clearly applicable to statutes and programs that are currently benefitting the named

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[7] Section 3.5 of Article 3 of the California Constitution provides that an administrative agency is without power to declare a statute unconstitutional unless an appellate court has first made a determination that the statute is unconstitutional. Thus, state agencies may not declare a state statute invalid under Proposition 209, or otherwise refuse to enforce a state statute based on Proposition 209, absent a state appellate court ruling that the statute is unconstitutional.

plaintiffs and it is virtually certain to be enforced. The amendment was recently enacted and is not a statute that has lain dormant for years and likely to remain moribund. *See Poe v. Ullman*, 367 U.S. 497, 501, 81 S.Ct. 1752, 1754-1755, 6 L.Ed.2d 989 (1961). Further, the Governor has already made moves to employ article 1, section 31, to invalidate certain state statutes in a pending civil action. *Wilson v. State Personnel Board*, 96-CS01082 (App. to File Mot. to Amend, Nov., 6 1996). Moreover, a conflict between the plaintiffs' interests and the challenged amendment is inevitable. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297-305, 99 S.Ct. 2301, 2308-2312, 60 L.Ed.2d 895 (1979) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough."); *cf. Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1215-1216, 39 L.Ed.2d 505 (1974) (a plaintiff need not first expose himself to actual arrest or prosecution before challenging the constitutionality of a criminal statute).

The constitutional injury asserted by the plaintiffs is directly connected to the actions of the defendants. *See S. v. D.*, 410 U.S. 614, 618, 93 S.Ct. 1146, 1149, 35 L.Ed.2d 536 (1973) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923)) ("The party who invokes judicial power must be able to show that he has sustained or is immediately in danger of sustaining some direct injury as a result of a statute's enforcement."). Two of the defendants, and now class representatives, the California Governor and Attorney General, are explicitly charged with the task of enforcing the laws of the state. The other defendants are governmental entities that are

under a duty to apply the amendment to existing statutes, ordinances, and regulations. Plaintiffs have shown that they will suffer the alleged constitutional injury when any one of the defendants enforces the constitutional amendment.

Finally, since the constitutional injury to the plaintiffs is allegedly caused by the enforcement of Proposition 209, plaintiffs' requested remedy, a declaration that the Proposition is unconstitutional and unenforceable, would unquestionably address the plaintiffs' alleged injuries. *See Allen v. Wright*, 468 U.S. 737, 753, n. 19, 104 S.Ct. 3315, 3325, n. 19, 82 L.Ed.2d 556 (1984) (the redressability requirement "examines the causal connection between the alleged injury and the judicial relief requested").

By demonstrating imminent injury attributable to the actions of the defendants that will be redressed by a favorable decision by this Court, plaintiffs have met the requirements for standing under the Article III "case or controversy" clause.[8]

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[8] At the outset, this Court must address defendants' contention that these proceedings should be stayed under the "*Pullman* abstention" doctrine. *Railroad Comm'n of Tex. v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). After having carefully reviewed the circumstances that defendants have forwarded in support of their request for abstention, this Court chooses not to abstain. Defendants have not presented an interpretation of challenged state law that this Court, in its discretion, believes warrants abstention. This Court, however, will revisit this area and consider all subsequent developments and arguments when it considers defendants' regularly noticed motion to abstain scheduled for January 6, 1997.

III. PRELIMINARY INJUNCTION STANDARD

According to Ninth Circuit precedent, in order to obtain a preliminary injunction, the moving party must demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in favor of the movant. *Associated General Contractors*, 950 F.2d at 1410. These formulations are not different tests but rather two points on a sliding scale in which the degree of irreparable harm increases as the probability of success on the merits decreases. *Id.* In considering a request for a preliminary injunction, a court must remain mindful that such relief is aimed primarily at preserving the status quo pending trial. *See Los Angeles Mem. Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir.1980) ("fundamental principle" governing preliminary injunctive relief is the need to maintain the status quo prior to determination on the merits). Under either formulation of the test, a court, in balancing the harms, must also take into account any public interests implicated by the injunctive relief sought. *Caribbean Marine Services Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir.1988).

Because the plaintiffs here allege that they suffer constitutional injury at the hands of Proposition 209, the Court must evaluate the merits of their constitutional claims before it can meaningfully address the irreparability and imminence of any harm. *See Bery v. City of New York*, 906 F.Supp. 163, 166 (S.D.N.Y.1995) (where constitutional injury is alleged, "the two prongs of the threshold showing required for injunctive relief merge

into one"), *rev'd on other grounds*, 97 F.3d 689 (2d Cir.1996).

IV. FINDINGS OF FACT

The following Findings of Fact are based on the preliminary record presently before the Court.

A. Characterization of Proposition 209

After qualifying as an initiative constitutional amendment, Proposition 209 was placed on the California general election ballot for November 5, 1996.

Prior to the election, each registered voter received an official California Ballot Pamphlet prepared by the non-partisan California Legislative Analyst's Office ("LAO").[9] This Pamphlet, which provided an official description and analysis of each statewide initiative, portrayed Proposition 209 as a measure that would eliminate race- and gender-conscious affirmative action programs in the public sector.[10] Accordingly, the California Ballot Pamphlet explained to voters that:

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[9] The Legislative Analyst is required, pursuant to the California Elections Code, to prepare a "concise summary" of the general meaning of each initiative as well as an analysis. CAL.ELEC.CODE §§ 9085-86.

[10] In formulating this description, the LAO extensively reviewed materials pertaining to Proposition 209, including "documents from proponents and opponents, journal articles, media coverage, legislative hearings, numerous conversations with proponents, opponents, government officials and other experts." Pls. Exh. 2, Taylor Decl. ¶ 2.

> A **YES** vote on [Proposition 209] means: The elimination of those affirmative action programs for women and minorities run by the state or local governments in the areas of public employment, contracting, and education that give "preferential treatment" on the basis of sex, race, color, ethnicity, or national origin.
>
> A **NO** vote on this measure means State and local government affirmative action programs would remain in effect to the extent they are permitted under the United States Constitution.

Pls. Exh. 2 (emphasis in original).

In addition to this brief summary, the Ballot Pamphlet also provided voters with a more extensive analysis of Proposition 209, which underscored that the initiative would effectively eliminate race- and gender-conscious affirmative action programs. Specifically, the LAO explained Proposition 209 and its effects as follows:

> [F]ederal, state, and local governments run many programs intended to increase opportunities for various groups – including women and racial and ethnic minority groups. These programs are commonly called "affirmative action" programs. . . .
>
> If [Proposition 209] is approved by the voters, it could affect [the following programs]. . . .
>
> **Public Employment and Contracting**
>
> The measure would eliminate affirmative action programs used to increase hiring and promotion opportunities for state or local government jobs,

where sex, race, or ethnicity are preferential factors in hiring, promotions, training or recruitment decisions. In addition, the measure would eliminate programs that give preference to women-owned or minority-owned companies on public contracts. . . .

Public Schools and Community Colleges

[T]he measure could eliminate, or cause fundamental changes to, *voluntary* desegregation programs run by school districts. . . . Examples of desegregation spending that could be affected by the measure include the special funding given to (1) "magnet" schools (in those cases where race or ethnicity are preferential factors in the admission of students to the schools), and (2) designated "racially isolated minority schools" that are located in areas with high proportions of racial or ethnic minorities. . . .

In addition, the measure would affect a variety of public school and community college programs such as counseling, tutoring, outreach, student financial aid, and financial aid to selected school districts in those cases where the programs provide preferences to individuals or schools based on race, sex, ethnicity, or national origin. . . .

University of California and California State University

The measure would affect admissions and other programs at the state's public universities. For example, the California State University ("CSU") uses race and ethnicity as factors in

> some of its admissions decisions. If this initiative is passed by the voters, it could no longer do so. . . .

Id. (emphasis in original). As the above reflects, the only programs identified by the LAO as potentially affected by Proposition 209 are race- and gender-conscious affirmative action programs.

The California Ballot Pamphlet also included partisan arguments submitted by proponents and opponents of the initiative. These arguments further established that the issue at stake in Proposition 209 was the continuation of public sector race- and gender-conscious affirmative action programs. The Argument In Favor Statement begins by instantly focusing the reader on the issue of affirmative action:

> A generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides.

Pls. Exh. 3. The next paragraph quotes the facially-neutral language of the initiative but then immediately returns to the issue of affirmative action, with a particular emphasis on race-conscious affirmative action:

> "REVERSE DISCRIMINATION" BASED ON RACE OR GENDER IS PLAIN WRONG!. . . . [S]tudents are being rejected from public universities because of their RACE. Job applicants are turned away because their RACE does not meet some "goal" or "timetable." Contracts are awarded to high bidders because they are of the

> preferred RACE . . . Proposition 209 will stop [these] terrible programs. . . .

Id. (emphasis in original).[11]

The Argument Against Statement also focused attention on Proposition 209's impact on affirmative action programs beneficial to women and minorities. The argument warns that:

> Proposition 209 will eliminate affirmative action programs . . . that help achieve equal opportunity for women and minorities. . . .

and concludes by stating that Proposition 209:

> poses as an equal opportunities initiative, but . . . [it] puts at risk every outreach program, sets back the gains made by women and puts

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[11] Ward Connerly, co-signer of this ballot argument, also made it clear in his public statements that Proposition 209 was intended to end affirmative action programs. In March 1996, for example, Connerly explained to reporters why he had decided against trying to end racial preferences in the University of California's ("UC") outreach programs for high school students and financial aid criteria: "Connerly said Wednesday that UC had already been torn apart by his successful push last summer to end racial preferences in admissions and hiring, and that affirmative action programs in California schools would most likely be banned anyway by [Proposition 209]. 'What do I gain by going ahead and forcing a showdown . . . [?] The public's going to end affirmative action in November.' " Pls. Exh. 4. Governor Wilson, another co-signor of the ballot initiative, also told reporters in March of 1995 that although the California Legislature was unwilling to "confront the issue of reverse discrimination arising from affirmative action programs . . . the people of California will get that opportunity at the ballot box." *Id.*

> the brakes on expanding opportunities for people in need.

Id. (quoting General Colin Powell).

B. Election Results and Response by Defendants

On November 5, 1996, the voters of California enacted Proposition 209 into law, with 4,736,180 votes (54%) cast in favor of the initiative and 3,986,196 votes (46%) cast in opposition.[12] Because the initiative is by its terms self-executing, public entities around the State faced the immediate question of implementation. Three of the defendants in this action responded by quickly acting to implement and enforce Proposition 209. On November 6, 1996, Governor Wilson issued an Executive Order (W-136-96) requiring state agencies to promulgate implementing regulations and identify all state statutes and programs pertaining to employment, education or contracting that grant or encourage preferences based on

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[12] The racial and gender breakdown of the vote was as follows:

VOTER	YES(%)	NO(%)
Male	61%	39%
Female	48%	52%
White	63%	37%
Black	26%	74%
Latino	24%	76%
Asian	39%	61%

Pinkus Decl. and attachment. As the above reflects, none of the above groups voted entirely for or against Proposition 209. However, "White voters were the only racial or ethnic group supporting 209." *Id.*

race, sex, color, ethnicity or national origin.[13] That same day, Attorney General Lungren instructed state agencies to comply immediately with Proposition 209 to the extent permitted by California law.[14] The University of California also promptly took steps to implement Proposition 209. *See* Dec. 6, 1996 Order at 2.[15] Other defendants expressed uncertainty and confusion regarding the appropriate response to the initiative. *See* Response of Defendant City of Pasadena to Plaintiffs' Request for Temporary Restraining Order at 2 ("[C]omplex questions now exist about how to reconcile the competing and seemingly conflicting requirements of federal, state and

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[13] Prior to the November election, Governor Wilson filed suit in Sacramento Superior Court (96-CS01082) against state agencies challenging the constitutionality of certain affirmative action programs. After the election, Governor Wilson promptly moved to amend his suit to include Proposition 209 as a basis for invalidating the challenged programs. On November 14, 1996, the California Court of Appeal ruled that the amendment could not be made pending resolution of a writ petition on a judicial disqualification order. However, Governor Wilson intends to add a Proposition 209 claim to the case "at the earliest available opportunity." Defendants' Supplemental Memorandum in Opposition to Motion for Preliminary Injunction at 5 n. 2.

[14] We also note that on November 25, 1996, the Governor and Attorney General both declined to agree to a moratorium on actions to enforce Proposition 209 pending further proceedings in this case. *See* Order Re Temporary Restraining Order, November 27, 1996, at 6.

[15] Given the self-executing nature of Proposition 209, all other members of the defendant class are also required to implement Proposition 209 immediately. *See* CAL. CONST. art. 1, § 31(h).

local affirmative action policies. These are issues which this City cannot resolve on its own.").

C. Effect of Proposition 209 on Affirmative Action Programs

Any California public entity that implements Proposition 209 is required to end voluntary race- and gender-conscious affirmative action programs in three areas: contracting, employment, and education. We thus briefly review each of these areas in turn.[16]

1. Contracting

Race- and gender-conscious affirmative action programs in California in the area of public contracting have taken various forms, from requiring that prime contractors make good-faith efforts to utilize women- or minority owned subcontractors to providing an advantage in evaluating bids. These programs are designed to address the continuing effects of past or present bias against the use of women- and minority-owned contractors on public sector projects. According to the evidence before the

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[16] The record in this case includes references to a range of affirmative action programs currently in effect in California. Some of these programs have been subjected to judicial challenge and found to be constitutionally permissible. *See, e.g., Assoc. General Contractors v. Coalition for Econ. Equity*, 748 F.Supp. 1443 (N.D.Cal.1990), *aff'd*, 950 F.2d 1401 (9th Cir.1991), *cert. denied*, 503 U.S. 985, 112 S.Ct. 1670, 118 L.Ed.2d 390 (1992). Others have never been challenged. With respect to these latter programs, the Court does not, of course, make any judgment with respect to their constitutionality.

Court, their effect has been to provide such contractors with substantial opportunities not previously available.

The experience of Antonio Ruiz provides one such example. Mr. Ruiz owns Ruiz Construction Company & Associates which engages in general engineering and construction work. Amended Ruiz Decl. filed in support of *amicus* ¶ 2. It is Mr. Ruiz' experience that "contractors accept the bids of those contractors with whom they have established ties." *Id.* ¶ 8. In 1985, Ruiz qualified to participate in the city of San Francisco's voluntary affirmative action program, which was adopted to remedy past discriminatory practices by the city in its letting of contracts. Prior to this time, Ruiz was unable to "get many large contractors to even accept [his] bids for subcontract work," and he in fact had obtained "only one contracting job with the City." ¶¶ 7-8. By participating in the City's affirmative action program, he was able to break through the old patterns of doing business and obtain subcontracts. ¶¶ 10-11. The exposure he gained led to additional business with prime contractors, and allowed him to build his business substantially and "form joint ventures to bid as a prime contractor on City contracts." ¶¶ 12-14. *See also* Fung Decl. ¶ 4 (affirmative action in public contracting has reduced discrimination against Asian American contractors and made it possible for them to bid competitively for public contracts); Wu Decl. at 144-145 (affirmative action in public contracting has substantially benefitted Asian Americans); Burns Decl. ¶ 4 (women-owned painting and wallpapering company benefitted substantially from San Francisco affirmative action contracting program); Chavez Decl. ¶¶ 3-4 (describing how affirmative action in public contracting

programs allowed him to break through the "old boy network" and obtain public contracts); Larson Decl. ¶ 16 (disparities between the availability of women- and minority-owned contractors and their use by public agencies "are noticeably reduced where government agencies implement affirmative action policies"), ¶ 20 (after Los Angeles adopted affirmative action programs, percentage of women businesses obtaining city contracts increased from 0.3% to 8% and percentage of minority businesses obtaining city contracts increased from 2% to 11.8%).

The record further demonstrates that implementation of Proposition 209 would substantially reduce opportunities in public contracting for women and minorities. Larson Decl. ¶ 17 (discussing studies showing that race or gender neutral programs designed to address underutilization of minority and women contractors were generally ineffective), ¶ 21; Chavez Decl. ¶ 5 (estimating that absent affirmative action program "his firm would lose up to 50 to 75% of" its public contracting work); Leonard Decl. ¶ 15 (discussing a study finding "not only a stagnation but a reversal of advances" for African-Americans under "weak" affirmative action programs).

2. Employment

Race- and gender-conscious affirmative action programs in California in the area of public employment generally allow an employer to consider the ethnicity or gender of an otherwise qualified applicant as one of many factors. Some programs may also utilize hiring goals. Such programs are typically designed to address the continuing effects of past or present bias against the

hiring and/or promotion of women and minority employees. According to the evidence before the Court, their effect has been to provide such employees with substantial opportunities not previously available.

The use of voluntary affirmative action in California's civil service provides one such example. In 1971, then-Governor Ronald Reagan issued an Executive Order establishing voluntary affirmative action in the California civil service. Bielby Decl. ¶ 4. Subsequently, state agencies and departments began using hiring goals and timetables in an effort to correct the existing underutilization of women and minorities.[17] As a consequence, the "index of gender and race segregation in state agencies" declined by 11 and 16 percent respectively between 1979 and 1986. ¶ 5. *See also* Newmann Decl. ¶ 7 (period from 1979-85 showed substantial statistical increases in the rate of female representation in the California "civil service and an even greater increase in nonwhite representation"); Badget Decl. ¶ 6 ("After state and federal governments began to require that state and local employers execute affirmative action plans in the early 1970s, the representation of Latino and black women increased dramatically as did access to managerial and professional jobs for all women of color."); Grillo Decl. ¶¶ 1-4 (affirmative action guidelines have been "very important" in

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[17] State civil service affirmative action programs "encourage some consideration of race, ethnicity and gender in hiring qualified civil service applicants and in choosing private firms to handle contracts for state services." California Senate Office of Research, The Status of Affirmative Action in California (1995), Pls. Exh. 5 at 2.

enabling women and minorities to gain civil service positions in California).

The record also indicates that implementation of Proposition 209 would substantially reduce opportunities for women and minorities in public employment.

3. Education

Race- and gender-conscious affirmative action programs in California in the area of public education range from voluntary desegregation and "magnet school" programs at the elementary school level to financial aid and admissions programs at the college and graduate school level. The evidence before the Court demonstrates that, overall, these programs have benefited minorities and women.

The University of California provides one example. Where the number of eligible applicants exceeds the spaces available, the University of California campuses select between 40 and 60% of students based upon their grades, test scores and course work. The remaining selections are made using a combination of criteria including California residence, physical and learning disabilities, educational disadvantage, family income, ethnicity, leadership ability, public service, special athletic, artistic or musical ability, composition of a student's family (whether student comes from a single- or two-parent family) and a student's family's college history (whether student is first-generation college bound).

Under this system of admissions, the racial composition of the total University of California freshman class for the Fall of 1994 was as follows:

	number	percentage
American Indian	214	.96
African American	968	4.35
Latino	3,313	14.87
Filipino	949	4.26
Asian	7,191	32.28
White/other	9,643	43.28
total:	22,278	100.00

Conrad Decl. ¶ 15.

The record indicates that, without the present race- and gender-conscious affirmative action efforts, the number of African American enrollments "could be reduced across the system by as much as 40 to 50 percent while Chicano/Latino enrollments could be reduced by 5 to 15 percent. . . . American Indian enrollments could be reduced by 40 to 50 percent. Filipino enrollments could increase by 5 percent or decline by 5 percent." Pls. Exh. 7 at i. On the other hand, Asian American enrollments would increase by 15 to 25 percent. White enrollments would likely remain roughly the same. *Id.*[18]

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[18] An analysis of the estimated effects of Proposition 209 on enrollments at just the U.C. Berkeley campus showed similar results. Specifically, it estimated that African American enrollment would drop from 222 (6.5%) in the 1995 class to 85-119 (2.5-3.5%) in the 1998 class, Latino enrollment would drop from 531 (15.6%) to 205-287 (6-8.4%); Native American enrollment would drop from 63 (1.8%) to 20-28 (6-8%), Asian American enrollment would increase from 1268 (37.2%) to 1516-1582 (44.5-46.4%), and White enrollment would increase from 1,018 (29.9%) to 1116-1164 (32.8-34.2%). Pls. Exh. 13.

The above estimates may well understate the actual decreases that would occur over time. As acceptance rates fall for African American, Latino and American Indian students, the applicant pool from these groups may fall as well, since high school students consider the probability of admission when deciding where to apply for college.

The record also suggests that, absent race- and gender-conscious admission programs, the admissions of African American, Latino, and American Indian students at California's public medical schools will significantly decrease. This in turn is likely to have a negative effect on the delivery of health care services in those communities. "On average, black physicians care for nearly six times as many black patients and Hispanic physicians care for nearly three times as many Hispanic patients as other physicians." Conrad Decl. ¶ 37; Drake Decl. ¶ 5.

D. Impact of Proposition 209 on the Political Process

Prior to the passage of Proposition 209, anyone seeking to petition his or her government representatives to adopt, amend, or retain race- or gender-conscious affirmative action programs faced the same burdens as those faced by any constituent seeking preferential treatment for any group in the area of contracting, employment or education.[19] Typically, this burden involves directly

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[19] This would include, for example, constituents seeking preferential treatment for veterans or the disabled in employment, for local businesses in contracting, or for athletes, artists or California residents in admissions to public schools.

petitioning and lobbying the specific representatives or policymakers with authority to adopt such programs. Such programs can generally be approved by simple majority vote or by executive decision. *See e.g.* Hernandez Decl. ¶ 5 (describing constituents' successful effort to convince city of San Francisco to adopt affirmative action program to remedy discriminatory practices in city contracting). In other cases, a local initiative process may be required.

After the passage of Proposition 209, women and minorities who wish to petition their government for race- or gender-conscious remedial programs face a considerably more daunting burden.[20] Before such persons can approach their school district, city council, county government, or any other subdivision of government with such a proposal, they must first obtain an amendment to the California Constitution that would either (a) repeal Proposition 209, or (b) permit the specific government entity at issue to adopt a particular race- or gender-conscious affirmative action program.

The California Constitution can be amended through either an initiative constitutional amendment or a legislative constitutional amendment. Either method places a heavy burden on those seeking to advocate the use of constitutionally-permissible affirmative action programs in their local communities.

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[20] Defendants have not questioned the substantial evidence before the Court showing that women and minorities continue to face the effects of past and present discrimination and thus will continue to have an interest in using the political process to seek remedial action through affirmative action programs.

Under the first method – an initiative constitutional amendment – sponsors must first obtain signatures supporting the initiative equal to 8% of the previous gubernatorial vote. In 1996, this required the collection of 693,230 valid signatures. Cain Decl. ¶ 4. Since many signatures are disqualified, in order to ensure the requisite number of valid signatures, approximately 50% more "raw" signatures must be collected. Zimmerman Decl. ¶ 8. Because these signatures must be collected within a 150-day time limit, a campaign must typically collect up to 7,000 signatures during each of the 150 days. *Id.* ¶ 9. Given these requirements, and the size of California, hiring paid signature gatherers is a virtual necessity. The cost of obtaining signatures runs from $0.70 to $1.50 per signature. *Id.* ¶ 10. Thus, even where volunteers gather some portion of the required signatures, the cost of securing sufficient signatures, and minimally staffing a few offices, can run from $500,000 to $1.5 million. *Id.* ¶ 11; Cain Decl. ¶ 6. Once the initiative has qualified, it must gain majority approval by the voters.

Under the second method – legislative constitutional amendment – sponsors must secure a two-thirds vote of approval by both the California Senate and Assembly. A majority of the voters must then approve the amendment at the next statewide election.

In either case, substantial funds are required to organize and fund the statewide campaign that follows the initiative qualification procedure or requisite legislative approval. Again, the size of California makes this endeavor particularly expensive. To reach at least 10 million voters directly, a campaign would have to talk to 1,000 voters each day for 30 years. Zimmerman Decl.

¶ 12. Campaigns must thus generally reach voters through television, radio, print advertising, and direct mail. According to the California Commission on Campaign Financing, $109 million was spent on statewide initiatives on the 1990 ballot. Cain Decl. ¶ 6. The campaign in support of Proposition 209 had spent $3.1 million by October 1996. Cain Decl. ¶ 6.

As a result of the new political-process hurdles erected by Proposition 209, members of the plaintiff class are effectively precluded from petitioning local and state policymakers and representatives to adopt, maintain, or expand race- or gender-conscious affirmative action programs. For example, the Coalition for Economic Equity (Coalition), a named plaintiff in this action, has proposed fifteen amendments to the City of San Francisco's affirmative action policy. Members of the Coalition have met with City Supervisors in preparation for a vote on the proposed legislation by the entire San Francisco Board of Supervisors. The Coalition is now precluded from further pursuing this legislation through the normal political channels that were available prior to the adoption of Proposition 209.

V. CONCLUSIONS OF LAW

A. Likelihood of Success on Plaintiffs' Equal Protection Claim

"The Equal Protection Clause of the 14th Amendment guarantees racial minorities the right to full participation in the political life of the community." *Seattle,* 458 U.S. at 467, 102 S.Ct. at 3193. This guarantee applies with equal force to women. *United States v. Virginia,* ___ U.S. at ___,

116 S.Ct. at 2275. The Equal Protection Clause not only prohibits the outright exclusion of women and minorities from the political process, but also prohibits more subtle distortions of the political process. *Seattle*, 458 U.S. at 467, 102 S.Ct. at 3193. In the words of the Supreme Court, "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote." *Id.* at 476, 102 S.Ct. at 3198 (quoting *Hunter*, 393 U.S. at 393, 89 S.Ct. at 561-562).

Plaintiffs argue that Proposition 209, despite its facial neutrality, violates the Equal Protection Clause because it restructures the political process to disadvantage only those seeking to enact legislation intended to benefit minorities and women. Relying on the Supreme Court opinions in *Seattle* and *Hunter*, plaintiffs emphasize that prior to the enactment of Proposition 209, supporters of race- and gender-conscious affirmative action programs were able to petition their state and local officials directly for such programs. After the passage of Proposition 209, however, these same advocates face the considerably more daunting task of mounting a statewide campaign to amend the California Constitution. At the same time, those seeking preferences based on any ground other than race or gender, such as age, disability, or veteran status, continue to enjoy access to the political process at all levels of government. Plaintiffs thus maintain that Proposition 209 denies them the equal protection of the laws by removing the authority to redress racial and gender problems – and only those problems – to a new and remote level of government, thereby singling out the

interests of minorities and women for a special political burden.

For the reasons noted earlier, the Court in testing Proposition 209 against the Equal Protection Clause focuses on a relatively narrow question: does Proposition 209's prohibition of constitutionally-permissible race- and gender-conscious affirmative action violate plaintiffs' right to equal protection of the laws?

1. Does the *Seattle-Hunter* Doctrine Apply?

Plaintiffs rely primarily on two Supreme Court cases, *Hunter* and *Seattle*, to support their equal protection claim. "These cases yield a simple but central principle. . . . [T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. [But] the State [may not] allocate governmental power nonneutrally by explicitly using the racial nature of a decision to determine the decisionmaking process." *Id.* at 470, 102 S.Ct. at 3195.

In *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), the Supreme Court addressed the efforts of citizens of Akron, Ohio, to overturn duly-enacted legislation prohibiting racial discrimination in housing. After the city council adopted a fair housing law, the citizens by referendum amended the city charter to require that fair housing ordinances be put to a city-wide vote before they could take effect. This requirement, set out in § 137 of the charter, not only affected future fair housing efforts, but also reached back to suspend the

previously-enacted ordinance. *See id.* at 387, 89 S.Ct. at 558-559. The Supreme Court found that § 137 singled out local legislation of special interest to minorities for a unique political burden; while those seeking to enact ordinances regulating real estate on any basis other than race merely had to persuade the Akron City Council, "for those who sought protection against racial bias, the approval of the City Council was not enough." *Id.* at 390, 89 S.Ct. at 560. The Supreme Court ultimately concluded that Akron's restructuring of the political process violated the 14th Amendment.

The Supreme Court's analysis of § 137 turned on two particular features of the measure. First, § 137 raised equal protection concerns because it singled out an issue of particular interest to racial minorities – racial discrimination in housing. Had the measure imposed a new political burden on all legislation, the Supreme Court was quick to point out, it would not have run afoul of the 14th Amendment. *Id.* at 393-95, 89 S.Ct. at 561-563 (Harlan, J., concurring). Second, § 137 was suspect because it imposed a novel political burden on all future efforts to enact fair housing legislation. Had the citizens of Akron used the referendum process simply to repeal the fair housing ordinance previously adopted by the Akron City Council, this action alone would have raised no equal protection difficulty. *Id.* at 390 n. 5, 89 S.Ct. at 560 n. 5; *see also Crawford*, 458 U.S. at 539, 102 S.Ct. at 3218-19. Although neither of these two features of § 137, standing alone, would have offended the 14th Amendment, the Supreme Court held that the confluence of the two factors – the targeting of a racial issue and the reordering of the

political process – constituted a racial classification that required the most exacting judicial scrutiny.

In *Washington v. Seattle School District No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982), the Supreme Court reaffirmed its ruling in *Hunter*, applying the rationale of that case to a statewide initiative designed to prohibit the mandatory busing of students to achieve racial integration in schools. After a Seattle school district took steps to establish a mandatory busing plan, the voters of Washington passed Initiative 350, which provided that "no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence." *Id.* at 462, 102 S.Ct. at 3190-3191. Three school districts that had previously initiated busing efforts challenged the initiative in court, and these challenges ultimately presented the Supreme Court with an "extraordinary question: whether an elected school board may use the Fourteenth Amendment to defend its program of busing for integration from attack by the State." *Id.* at 459, 102 S.Ct. at 3189 (emphasis in original).

Despite its facially neutral language, the Supreme Court found that Initiative 350 in reality barred only busing plans aimed at achieving racial integration while permitting busing for other purposes. In striking down the initiative, the Court found that it, like the enactment in *Hunter*, singled out an issue of concern to minorities – racial busing – and imposed special political burdens on those who supported the issue. These features of Initiative 350 led the Court to find that the facially-neutral measure was, in reality, a racial classification subject to

the most searching judicial scrutiny. *Id.* at 485, 102 S.Ct. at 3202-3203. In the words of the Court, "It is beyond dispute . . . that the initiative was enacted 'because of,' not merely 'in spite of,' its adverse effects upon busing for integration." *Id.* at 471, 102 S.Ct. at 3195. As in *Hunter*, the Supreme Court concluded that, viewed in this light, Initiative 350 violated the 14th Amendment.

Before the Court applies these precedents to the case at bar, it notes that Proposition 209 shares several characteristics with the measures struck down in *Hunter* and *Seattle*. All three initiatives are facially neutral. All three grew from controversial efforts aimed at rolling back legislative gains that were intended as remedies for historical discrimination suffered by particular groups. Perhaps most importantly, in the wake of all three measures, those seeking to reenact such remedies could no longer use the same political mechanisms that had been available prior to the passage of the enactments.

As plaintiffs themselves concede, however, one difference between *Seattle* and *Hunter* and the matter at bar is readily apparent: *Seattle* and *Hunter* exclusively address racial issues,[21] whereas Proposition 209 addresses both race and gender preferences. Defendants urge this Court not to import the Supreme Court's *Seattle* and *Hunter* reasoning into the context of gender.

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[21] The referendum at issue in *Hunter* also burdened the interests of religious minorities, *see* 393 U.S. at 386, 89 S.Ct. at 558, but the Supreme Court's analysis of § 137 focused primarily on its racial component, *see id.* at 391, 89 S.Ct. at 560-561.

The Supreme Court "has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship status." *United States v. Virginia*, ___ U.S. at ___, 116 S.Ct. at 2275. Because "our Nation has had a long and unfortunate history of sex discrimination," equal protection jurisprudence requires that gender classifications must survive heightened judicial scrutiny. *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, ___, 114 S.Ct. 1419, 1425, 128 L.Ed.2d 89 (1994) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684, 93 S.Ct. 1764, 1769, 36 L.Ed.2d 583 (1973)). Gender and racial classifications, however, do not receive identical treatment under the Equal Protection Clause; to date, the Supreme Court has reserved strict scrutiny for racial classifications. *United States v. Virginia*, ___ U.S. at ___ n. 6, 116 S.Ct. at 2275 n. 6. Gender classifications, meanwhile, are subject to less stringent intermediate scrutiny review. *Id.* at ___, 116 S.Ct. at 2274.

The differing levels of judicial scrutiny accorded race and gender classifications, however, do not render the reasoning of *Seattle* and *Hunter* inappropriate in the context of gender. On the contrary, the doctrinal approach of those cases is wholly consonant with the heightened scrutiny applicable to gender classifications. When a measure is challenged under the Equal Protection Clause, a court is required, as a threshold matter, to determine whether the challenged measure contains a race or gender classification. *See Adarand Constructors, Inc. v. Pena*, ___ U.S. ___, ___, 115 S.Ct. 2097, 2105, 132 L.Ed.2d 158 (1995) (noting that presence of a race classification made the

Arlington Heights intent analysis unnecessary); *Personnel Adm'r. of Mass. v. Feeney*, 442 U.S. 256, 273-74, 99 S.Ct. 2282, 2293-2294, 60 L.Ed.2d 870 (1979) (noting different equal protection analysis when no explicit gender classification is present). It is this threshold question that the *Seattle-Hunter* analysis is meant to answer. Only after concluding that a racial classification was involved did the Supreme Court in *Seattle* and *Hunter* proceed to subject the challenged enactments to strict scrutiny. *Seattle*, 458 U.S. at 485, 102 S.Ct. at 3202-3203; *Hunter*, 393 U.S. at 391-92, 89 S.Ct. at 560-561. In the gender context, similarly, a court should first apply the *Seattle-Hunter* analysis to determine whether a gender classification exists, and then apply the appropriate intermediate equal protection scrutiny. It is precisely by applying the *Seattle-Hunter* doctrine in cases involving gender that a court fulfills its obligation to scrutinize gender classifications carefully.

Irrespective of the applicability of the rationale of *Seattle* and *Hunter* to gender, defendants maintain that the present case is not controlled by these precedents. Simply put, the defendants insist that because this case is different in kind from *Seattle* and *Hunter*, the *Seattle-Hunter* doctrine is wholly irrelevant.

First, defendants argue that Proposition 209, unlike the Washington and Akron initiatives, expressly prohibits classifications based on race and gender, and thus cannot be read to create such classifications. Defendants essentially ask this Court to read the plain language of Proposition 209, which concededly contains no classification on its face, and go no further. While it would certainly

streamline the inquiry, this approach is expressly disapproved in *Hunter* and *Seattle*. Despite the facial neutrality of the challenged enactments in both of those cases, the Supreme Court looked beyond the plain language of the measure in question and inquired whether, "in reality, the burden imposed by [the] arrangement necessarily falls on the minority." *Seattle*, 458 U.S. at 468, 102 S.Ct. at 3194 (emphasis added, internal quotations omitted); *see also Hunter*, 393 U.S. at 391, 89 S.Ct. at 560-561.[22]

Defendants' argument, moreover, asks this Court to overlook the central purpose of the *Seattle-Hunter* doctrine: to determine whether facially neutral enactments in reality rest on "distinctions based on race" or gender. *Seattle*, 458 U.S. at 485, 102 S.Ct. at 3202-3203. Defendants cannot use Proposition 209's facial neutrality as a shield against the application of the *Seattle-Hunter* analysis; it is precisely the measure's facial neutrality that makes application of those cases appropriate. *Compare id.* (applying *Hunter* to find that a facially neutral measure operated as a racial classification) with *Crawford*, 458 U.S. at 539, 102 S.Ct. at 3218-3219 (applying the *Hunter* analysis to find that a facially neutral measure did not embody a racial

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[22] Defendants' very argument, moreover, was before the Supreme Court in *Seattle*. As Justice Powell points out in his *Seattle* dissent, 458 U.S. at 491 n. 5, 102 S.Ct. at 3206 n. 5, Judge Wright, dissenting in the Ninth Circuit opinion in *Seattle*, concluded that "Initiative 350 does not treat persons differently on the basis of race." *Seattle Sch. Dist. No. 1 v. Washington*, 633 F.2d 1338, 1351 (9th Cir.1980) (Wright, J., dissenting). This conclusion did not win the approval of the Supreme Court, however, which affirmed the Ninth Circuit majority.

classification). Defendants have simply mistaken the starting point of the equal protection analysis with its ending point.

Defendants next attempt to distinguish the *Seattle* and *Hunter* cases by shifting the focus of the inquiry from the initiatives themselves to the legislative efforts they effectively bar. From this standpoint, the defendants make two arguments that are variations on a single theme to distinguish *Seattle* and *Hunter* from the case at hand.

In the first argument, defendants contend that neither the mandatory busing programs barred by Initiative 350 nor the fair housing legislation barred by Akron's § 137 placed a burden upon the equal protection rights of nonminorities. Defendants insist that Proposition 209, in contrast, would outlaw preferences that by their very nature inflict injury on nonminorities. *See Adarand*, ___ U.S. at ___, 115 S.Ct. at 2114 ("[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury. . . . "); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280-83, 106 S.Ct. 1842, 1850-52, 90 L.Ed.2d 260 (1986) (opinion of Powell, J.) (discussing the burden placed on nonminorities by affirmative action programs aimed at remedying past discrimination). On this theory, Proposition 209 is distinguishable from the initiatives in *Seattle* and *Hunter* because it only interferes with "zero-sum" antidiscrimination efforts – those that help minorities, but do so at the expense of nonminorities.

The second argument focuses on the judicial scrutiny that attends the efforts banned by the challenged initiatives. According to defendants, the affirmative action

efforts prohibited by Proposition 209 are, under existing 14th Amendment principles, themselves constitutionally suspect and subject to heightened scrutiny. *See Adarand*, ___ U.S. at ___, 115 S.Ct. at 2117. The fair housing ordinance and the busing programs that were overturned by the initiatives in *Seattle* and *Hunter*, defendants argue, did not themselves trigger heightened equal protection scrutiny.

Defendants' proposed distinctions, although not implausible on their face, both fail for the same reason: nothing in *Seattle* or *Hunter* suggests that the Supreme Court holdings turned on these features of the challenged amendments.[23] If the application of the *Seattle-Hunter* doctrine to Initiative 350 turned on whether or not *Seattle*'s mandatory busing plan could be characterized as "zero-sum," as the defendants contend, the Supreme Court would presumably have addressed this difficult threshold issue. The opinion in *Seattle*, however, applied *Hunter* without examining whether mandatory busing presented a "zero-sum" scenario.[24] Similarly, the

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[23] The Court also notes that the defendants have not cited any authority addressing whether men suffer an equal protection injury of the sort set forth in *Adarand*, ___ U.S. at ___, ___, 115 S.Ct. at 2114, when a governmental body adopts a gender-conscious affirmative action program.

[24] The Court also notes that the language of Proposition 209 itself undermines defendants' proposed "zero-sum" distinction. Defendants urge that *Seattle* ought not apply where the challenged measure interferes only with "zero-sum" antidiscrimination efforts. By its terms, however, Proposition 209 prohibits *all* race and gender preferences, not merely those that operate in a "zero-sum" fashion. Consequently, Proposition 209's reach may extend beyond mere "zero-sum"

Supreme Court in *Seattle* expressly declined to reach the question of what level of equal protection scrutiny was applicable to *Seattle*'s busing plan. *Seattle*, 458 U.S. at 472 n. 15, 102 S.Ct. at 3196. Consequently, defendants' contention that *Seattle*'s holding turns on the scrutiny applicable to Seattle's busing program is unpersuasive.

Defendants' view of Initiative 350, moreover, overlooks the raging controversy that surrounded the issue of mandatory busing in 1978 and that constituted the backdrop for the Supreme Court's decision in *Seattle*. *See Seattle Sch. Dist. No. 1 v. Washington*, 473 F.Supp. 996, 1005-10 (W.D.Wash.1979), *aff'd*, 633 F.2d 1338 (9th Cir.1980), *aff'd*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982) (findings regarding the political controversy surrounding Seattle's busing efforts). It is evident that many who supported Initiative 350 felt that Seattle's busing plan benefited minority students at the expense of the majority. This is borne out by the fact that shortly after the implementation of the plan, four school board members who supported the plan narrowly avoided recall. *Seattle*, 458 U.S. at 460 n. 1, 102 S.Ct. at 3189 n. 1. As a result, defendants' conclusion that the busing plan in *Seattle* did not burden majority interests is, at best, both factually and legally ambiguous. *Id.* at 495 n. 9, 102 S.Ct. at 3208 n. 9 (Powell, J., dissenting) (suggesting that busing aimed at desegregation might, in fact, be viewed as burdensome to nonminority students).

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antidiscrimination efforts. Put another way, Proposition 209 itself appears to be oblivious to the very distinction urged by defendants on its behalf.

Finally, defendants' focus on the particular legislation barred by Initiative 350, Akron's § 137, and Proposition 209, rather than on the initiatives themselves, suffers from a more fundamental flaw. Accepting defendants' arguments would essentially require that this Court read *Seattle* and *Hunter* as cases about the limits on state-sponsored remedies for past discrimination. This is the inevitable conclusion that emerges from a primary focus on the legislation blocked, rather than on the blocking initiative. As this Court has pointed out, however, the instant case, as well as *Seattle* and *Hunter*, are more appropriately understood as cases about access to the political process.

Because the *Seattle-Hunter* doctrine is designed to determine whether facially neutral enactments single out race and gender issues for unique political burdens, and thus are suspect classifications, defendants' efforts to distinguish *Seattle* and *Hunter* must fail. If, in reality, Proposition 209 does not single out a racial or gender issue for unfavorable treatment in the political process, the initiative will emerge from the *Seattle-Hunter* analysis unscathed. *See Crawford*, 458 U.S. at 539, 102 S.Ct. at 3218-19 (simple repeal of antidiscrimination law raises no equal protection concern). If, on the other hand, Proposition 209's facial neutrality masks a racial or gender classification, the Equal Protection Clause requires that the measure be subjected to heightened scrutiny. *See Seattle*, 458 U.S. at 485, 102 S.Ct. at 3202-03. It is to this inquiry that this Court now turns.[25]

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[25] Counsel for defendants at oral argument suggested that, to the extent the present Supreme Court might not embrace the

2. Application of the *Seattle-Hunter* Doctrine

The *Seattle* opinion sets out the framework for analysis: if an "initiative removes the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests," it must be examined for equal protection purposes as if it were a racial classification. *Id.* Keeping the earlier discussion regarding the extension of this analysis to the gender context in mind, the Court applies the *Seattle* test to Proposition 209.

a. Racial Focus

Just as the Supreme Court did in *Seattle*, this Court begins its analysis by asking whether Proposition 209, despite its facial neutrality, singles out an issue of special interest to minorities or women, and thus has a "racial [or gender] focus." *Id.* at 474, 102 S.Ct. at 3197.

In concluding that Initiative 350 had a racial focus, the Supreme Court relied in part on the perceptions of Washington voters. The Court found that despite Initiative 350's neutral language, proponents of the measure assured voters that it would affect only racial busing. *Id.* at 471, 102 S.Ct. at 3195-96. Given the nature of the

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rationale of *Seattle* and *Hunter*, this Court is not bound by those opinions. The Court does not so interpret the law, and thus declines to adopt defendants' argument. It is not for this Court to decide whether the Supreme Court might overturn its previous rulings. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989) (lower court must follow Supreme Court precedent until it is overturned).

political campaign that surrounded its passage and the measure's practical effect, the Supreme Court had no difficulty joining the District Court and Court of Appeals in concluding that Initiative 350 was "effectively drawn for racial purposes." *Id.*

The record likewise suggests that the campaign for Proposition 209 had a racial and gender focus. As described in the Findings of Fact, the independent LAO, as well as the supporters and opponents of Proposition 209, characterized Proposition 209 as a referendum on race- and gender-conscious affirmative action. Named defendant Governor Pete Wilson himself signed the Argument in Favor statement, which opens with the following: THE RIGHT THING TO DO! A generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides. Pls. Exh. 2. Just as the voters of Washington perceived Initiative 350 as a referendum on busing, the evidence presently before the Court indicates that people of California viewed Proposition 209 as a referendum on affirmative action.

The Supreme Court, in evaluating whether Initiative 350 had a racial focus, also considered the enactment's practical effect. In *Seattle*, despite Initiative 350's non-racial language regulating student transportation, the practical effect of the measure was to prohibit only busing for racial integration, while leaving school districts free to employ busing for other purposes. *Seattle*, 458 U.S. at 474-75, 102 S.Ct. at 3197-98. Similarly, while Proposition 209's general language barring discrimination merely duplicates existing state and federal law, and thus does

not materially alter existing state practices, Proposition 209's prohibition on preferences will have a practical effect on existing programs. The California Legislative Analyst, for example, concluded that Proposition 209's ban on race and gender preferences would eliminate existing state and local race- and gender-conscious affirmative action efforts in contracting, employment, and education. Pls. Exh. 2. The defendants, moreover, despite repeated questioning by plaintiffs and the Court, have not yet identified a single existing program, other than race- and gender-conscious affirmative action programs, that would be affected by Proposition 209.[26]

While all parties concede that Proposition 209, at the very least, will prohibit race- and gender-conscious affirmative action efforts, it is equally plain that preferences unrelated to race and gender remain unaffected by Proposition 209. The University of California, for example, remains free after Proposition 209 to continue its practice of considering in its admissions decisions "California residence . . . , physical and learning disabilities, educational disadvantage, family income, and whether a student comes from a two-parent or single-parent family, is first-generation college bound or has special talents (for example, artistic or athletic ability) or experiences," Young

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[26] Counsel for defendant-intervenor CADP suggested at oral argument that there may be municipal programs granting preferences to certain ethnic groups that might be barred by Proposition 209. Aside from counsel's oral representation, however, the Court has nothing on the record from which to conclude that Proposition 209 has a substantial impact beyond the race- and gender-conscious affirmative action context.

Decl. ¶ 13. Thus, the primary practical effect of Proposition 209 is to eliminate existing governmental race- and gender-conscious affirmative action programs in contracting, education, and employment and prohibit their creation in the future, while leaving governmental entities free to employ preferences based on any criteria other than race or gender.

The opinion in *Seattle*, after concluding that the practical effect of Initiative 350 was to prohibit racial busing, addressed whether racial busing was an issue of special interest to minorities. Satisfied that Proposition 209 singles out race- and gender-conscious affirmative action, the Court turns to a similar question: is affirmative action an issue of special interest to minorities and women? The Court finds that the record fully supports plaintiffs' contention that state-sponsored race- and gender-conscious affirmative action "inures primarily to the benefit of the minority, and is designed for that purpose." *Seattle*, 458 U.S. at 472, 102 S.Ct. at 3196. As discussed in the Findings of Fact, plaintiffs have produced extensive evidence documenting the dramatic effect that affirmative action has had on the opportunities available to minorities and women in public contracting, employment, and education.

Defendant-intervenor CADP stresses that, in recent years, the effectiveness and wisdom of race- and gender-conscious affirmative action programs have been called into question. In particular, CADP notes that as California becomes increasingly heterogeneous, affirmative action programs designed to benefit one racial minority can actually harm the interests of another racial minority. This insight, however, has no bearing on the "racial

focus" inquiry mandated by *Seattle*. The fact that African Americans and whites could be found on both sides of the busing debate in that case did not prevent the Supreme Court from concluding that Initiative 350 addressed a racial issue. *Id.* at 472, 102 S.Ct. at 3196 (noting that "Negroes and whites may be counted among both the supporters and the opponents of Initiative 350").

In any event, the "racial focus" inquiry set down in *Seattle* does not depend on the wisdom or efficacy of any particular affirmative action program. "In the absence of a constitutional violation, the desirability and efficacy" of race- and gender-conscious affirmative action "are matters to be resolved through the political process." *Id.* at 474, 102 S.Ct. at 3197. Rather, the question posed by *Seattle* is whether the issue in question is generally perceived as one of special interest to minorities and women, and if the issue has been singled out for unfavorable political treatment. As the Supreme Court held in *Seattle*, an enactment is unconstitutional if it "removes the authority to address *a racial problem* – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* (emphasis added). This Court has no trouble concluding that affirmative action is appropriately understood as "racial problem" and, similarly, a "gender problem" in the sense meant by the Supreme Court. *Id.* ("For present purposes, it is enough that minorities may consider busing for integration to be legislation that is in their interest.")

For the foregoing reasons, the Court is satisfied that plaintiffs have demonstrated that Proposition 209 "was enacted 'because of,' not merely 'in spite of,' its adverse

effects upon" affirmative action, and thus that the measure was effectively drawn for racial purposes.[27] *Id.* at 471, 102 S.Ct. at 3195-96.

b. Restructuring the Political Process

The Court next must ask whether Proposition 209 restructures the political process to the detriment of the interests of minorities and women.

The Supreme Court in *Seattle* addressed this issue by comparing the political burden faced by those seeking race-based busing with the burden faced by those seeking student assignment policies for nonracial reasons. Prior to the passage of Initiative 350, the state left virtually all matters of education policy, including busing to achieve integration, to local school boards. *Id.* at 477-82, 102 S.Ct. at 3198-3201. The Court found that, after Initiative 350, "[t]hose favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate." *Id.* at 474, 102 S.Ct. at 3197. Those interested in busing for other purposes, in contrast, could continue to petition their local school boards for such programs. The Court concluded that this

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[27] In so finding, the Court does not pass on whether any discriminatory intent lay behind the adoption of Proposition 209. The Supreme Court in *Seattle* made it plain that such an inquiry is not required under the *Seattle-Hunter* analysis. 458 U.S. at 484-86, 102 S.Ct. at 3202-03. The Court nevertheless notes that the Supreme Court in *Seattle* also suggested that any measure that ran afoul of the *Seattle-Hunter* analysis "inevitably raises dangers of impermissible motivation." *Id.* at 486 n. 30, 102 S.Ct. at 3203 n. 30.

restructuring of political authority imposed a "comparative burden . . . on minority participation in the political process." *Id.* at 480 n. 23, 102 S.Ct. at 3200 n. 23.

In evaluating Proposition 209, this Court employs the same comparative approach utilized in *Seattle*. The defendants here concede that prior to Proposition 209, those seeking preferences – whether based on race, gender, disability, veteran status, economic disadvantage, age, residency, or any other basis – in public contracting, employment, and education could directly petition their state and local governmental entities for such preferential treatment. After the enactment of Proposition 209, those seeking race- and gender-conscious affirmative action must first mount a statewide campaign to amend the state constitution, while those seeking preferential treatment on all other grounds need not surmount any new political hurdle.

The record compiled by plaintiffs indicates that this changed political landscape imposes a substantial burden on the interests of women and minorities. The Coalition, for example, has been instrumental in persuading the City and County of San Francisco ("San Francisco") to adopt contracting ordinances that include race- and gender-conscious provisions designed to remedy the city's history of discrimination in contracting ("MWBE Ordinance").[28] Since the adoption of the MWBE Ordinance,

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[28] The MWBE Ordinance is codified at San Francisco Administrative Code § 12D and has been the subject of extensive litigation in this Court. *See, e.g., F.W. Spencer & Son, Inc. v. City and County of San Francisco*, C 95-4242 TEH; *Associated Gen. Contractors v. City and County of San Francisco*, 748 F.Supp.

the Coalition has continued to support the program, periodically proposing modifications designed to enhance its effectiveness and ensure its conformity with federal and state law.[29]

After Proposition 209, the doors of San Francisco government are closed to groups like the Coalition. The Coalition thus faces not only the prospect that San Francisco's MBWE Ordinance might fall to a court challenge brought under Proposition 209,[30] but also must embark on a statewide campaign to repeal or amend Proposition 209 if they are to enact any similar legislation in the future. As detailed in the Findings of Fact, the evidence before the Court indicates that this additional political hurdle is a high one: the Coalition would need to collect approximately 700,000 valid signatures to qualify an initiative, and then would have to mount an expensive

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1443 (N.D.Cal.1990), *aff'd*, 950 F.2d 1401 (9th Cir.1991), *cert. denied*, 503 U.S. 985, 112 S.Ct. 1670, 118 L.Ed.2d 390 (1992).

[29] As CADP notes, the Equal Protection Clause itself imposes a considerable burden on governmental entities seeking to adopt race- and gender-conscious affirmative action programs, and thus indirectly places a considerable burden on organizations like the Coalition that lobby for such programs. *See Associated Gen. Contractors*, 950 F.2d at 1413-18 (after examining San Francisco's MWBE Ordinance using exacting equal protection scrutiny, holding that the ordinance does not offend the 14th Amendment). What the Equal Protection Clause does not do, however, is force organizations like the Coalition to take their petition to "a new and remote" level of government, as does Proposition 209.

[30] San Francisco admits that legal challenges to its MWBE Ordinance based on Proposition 209 are imminent. The Court expresses no opinion on the merits of such a claim, should it ultimately be pressed by a party to this or any other suit.

statewide media campaign to persuade voters to vote in its favor at the polls. This political burden stands in stark contrast to the local effort the Coalition faced prior to the passage of Proposition 209.

The example of San Francisco's MWBE Ordinance also demonstrates that Proposition 209, like Initiative 350, burdens minority interests by indiscriminately eliminating even programs that do *not* arouse popular opposition. Despite Proposition 209's statewide victory, the voters of San Francisco opposed the measure by a margin of 70.5% to 29.4%.[31] In the words of the Supreme Court,

> In such situations the initiative makes the enactment of racially beneficial legislation difficult, though the particular program involved might not have inspired opposition had it been promulgated through the usual legislative processes used for comparable legislation. This imposes direct and undeniable burdens on minority interests.

Seattle, 458 U.S. at 483-84, 102 S.Ct. at 3202 (internal footnote omitted); *see also Hunter*, 393 U.S. at 395-96, 89 S.Ct. at 562-63 (noting that § 137 has its real impact only where fair housing ordinances do not arouse opposition, because truly controversial measures would presumably be repealed via the existing referendum procedure).

In response to plaintiffs' showing regarding political burden, defendants insist that Proposition 209 in no way reorders the political process with respect to race and

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[31] The Court takes judicial notice of these figures. *See* San Francisco Elections Commission election summary, available at http://www.ci.sf.ca.us/election/update.htm.

gender preferences. In their view, the proper forum for addressing fundamental issues regarding individual rights has always been the state constitution, and Proposition 209 merely modifies the existing constitutional guarantee of equal treatment at the appropriate governmental level.

This argument has substantial merit with respect to Proposition 209's broad antidiscrimination provision – the general ban on invidious race and gender discrimination is certainly a matter of constitutional decisionmaking. As the Court has pointed out, however, it is Proposition 209's ban on preferences, not its general ban on discrimination, that is the focus of the instant suit. In this narrower context, defendants' argument falls short. Prior to the passage of Proposition 209, the discretion to adopt constitutionally-permissible race- and gender-conscious affirmative action programs was, as defendants' counsel conceded at oral argument, lodged with state and local government entities, not reserved at the constitutional level.

Moreover, the Supreme Court explicitly rejected defendants' argument in *Seattle*. In that case, Washington argued that it exercised plenary power over matters concerning public education, and that Initiative 350's ban on racial busing should thus be understood as change in policy by the body ordinarily charged with policymaking discretion. *Seattle*, 458 U.S. at 475-76, 102 S.Ct. at 3198. In rejecting this view, the Supreme Court emphasized that the issue was not whether the state had the power to ban race-based busing, but rather whether it had "exercised its power in such a way as to place special, and therefore impermissible, burdens on minority interests." *Id.* at 476

n. 18, 102 S.Ct. at 3198 n. 18. Similarly, in the instant case no one challenges California's power to modify its basic constitutional guarantees of individual rights. The "single narrow question" before this Court is whether the state has exercised that power in a manner that violates the 14th Amendment. *Id.*

The foregoing discussion also addresses defendants' contention that the present case is controlled by the Supreme Court's decision in *Crawford v. Board of Education*, 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982), which was handed down on the same day as *Seattle*. That case involved a California constitutional amendment, Proposition 1, that the voters enacted in 1979. Proposition 1 aligned the authority of state courts to that of the federal courts with respect to court-ordered racial busing. In reviewing this initiative, the Supreme Court held that it merely repealed the prior constitutional language that had been interpreted to grant state courts more flexibility in ordering busing than was possessed by federal courts. *Id.* at 539, 102 S.Ct. at 3218-19. The Supreme Court further found that the repeal did not distort the political process – in the Supreme Court's view, what the people of California gave via the constitution, they chose to repeal via the same mechanism. *Id.* at 541, 102 S.Ct. at 3219-20; *id.* at 547, 102 S.Ct. at 3222-23 (Blackmun, J., concurring). Local school boards, which had been free to adopt certain busing programs aimed at desegregation, remained free after Proposition 1 to adopt such programs.[32] *Id.* at 535-536,

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[32] A number of such voluntarily adopted desegregation programs, in fact, may well be threatened by Proposition 209. *See* Pls.Exh. 8 (Los Angeles Unified School District, Fingertip

102 S.Ct. at 3216-17 (noting that this feature of Proposition 1 distinguished it from the initiative in *Seattle*).

As should be clear from the earlier discussion, the present case is dramatically different from *Crawford*. First, Proposition 209 cannot be characterized as a mere repeal. Proposition 209, by its terms, not only repeals all existing state and local affirmative action programs, but also prohibits the adoption of such programs in the future. In so doing, Proposition 209 displaces authority with respect to a race and gender issue to "a new and remote level of government," *Seattle*, 458 U.S. at 483, 102 S.Ct. at 3202, and thus reorders the political process to the detriment of women and minorities. Hence, rather than supporting defendants' position, *Crawford* underscores the troubling features of Proposition 209.

Because the Court finds, based on the foregoing, that Proposition 209 singles out an issue of special concern to minorities and women – race- and gender-conscious affirmative action – and alters the political process solely with respect to this issue, it concludes that the initiative "plainly rests on distinctions based on race." *Id.* at 485, 102 S.Ct. at 3203 (internal quotes omitted).

c. Heightened Scrutiny

Where a governmental enactment rests on a racial or gender classification, a court must expose it to "a most searching examination." *Adarand*, ___ U.S. at ___, 115 S.Ct. at 2111 (quoting *Wygant*, 476 U.S. at 273, 106 S.Ct. at

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Facts: Student Integration Services, 1995-96, Reference Guide No. 10 (Rev.)).

1846-47 (opinion of Powell, J.)). In examining race and gender classifications, however, the Supreme Court has employed two different standards, reserving the most exacting judicial scrutiny for situations involving race.[33] *United States v. Virginia*, ___ U.S. at ___ n. 6, 116 S.Ct. at 2275 n. 6. Because this Court finds that Proposition 209 fails to survive the lesser scrutiny due its inherent gender classification, it need not apply the more stringent strict scrutiny test.[34]

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[33] The Supreme Court has never squarely decided whether classifications based on gender are inherently suspect and thus deserving of strict scrutiny review. The rule drawn from the cases is that gender classifications must survive *at least* intermediate scrutiny. *See United States v. Virginia*, ___ U.S. ___, ___, 116 S.Ct. 2264, 2275, 135 L.Ed.2d 735 (1996) (gender classifications must clear "at least" intermediate scrutiny); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, ___ n. 6, 114 S.Ct. 1419, 1425 n. 6, 128 L.Ed.2d 89 (1994) (Court "need not decide whether classifications based on gender are inherently suspect"); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 26, 114 S.Ct. 367, 373, 126 L.Ed.2d 295 (1993) (Ginsburg, J., concurring) (noting that "it remains an open question whether classifications based on gender are inherently suspect") (citations and internal quotes omitted). Because Proposition 209 fails to survive intermediate scrutiny, this Court need not decide whether gender classifications are inherently suspect.

[34] Other courts have suggested that *Seattle* and *Hunter* can be explained as cases involving the fundamental right of all citizens to participate equally in the political process. *See, e.g., Evans v. Romer*, 854 P.2d 1270, 1279-82 (Colo.1993), *aff'd on other grounds*, ___ U.S. ___, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). On this theory, any law that infringed this fundamental right would be subject to strict scrutiny, regardless of the race or gender focus of the enactment. This Court's application of intermediate scrutiny to the gender classification inherent in Proposition 209 is not meant as a rejection of the fundamental rights approach.

In applying the intermediate scrutiny test appropriate to gender classifications, the Court is mindful of the Supreme Court's recent cases in this area. *See United States v. Virginia, supra; J.E.B. v. Alabama ex rel. T.B., supra.* According to the Supreme Court, "Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history." *United States v. Virginia,* ___ U.S. at ___, 116 S.Ct. at 2274. In order to survive this scrutiny, a gender classification must be supported by an "exceedingly persuasive justification." *Id.* at ___, 116 S.Ct. at 2275. The state has the burden of showing that the challenged classification "serves important governmental objectives" and that the means employed are "substantially related to the achievement of those objectives." *Id.*

In applying this demanding test, the Court asks a simple question: what important governmental interest is served by reordering the political process to the detriment of women's interests? With respect to this question, the defendants have not shouldered their burden. Defendants first suggest that Proposition 209 serves the important state interest of ending discrimination on the basis of race and gender. While undoubtedly important, however, this state interest is a non-sequitor with respect to Proposition 209. The Court fails to see how this purported interest is related to, much less justifies, the nonneutral reordering of the political process that is at issue in this case. As *Seattle* and *Hunter* make clear, it is *not* Proposition 209's prohibition on affirmative action that raises

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Rather, because the parties have not argued this issue, the Court expressly declines to pass on the merits of this theory.

equal protection concerns; rather, it is the reordering of the political process that triggers exacting judicial scrutiny. Defendants have not identified any feature of the prior political process that was discriminatory, and thus their invocation of a state interest in eliminating discrimination cannot justify the nonneutral reordering of that process.

The defendants also suggest that Proposition 209 serves an important state interest in avoiding liability under the 14th Amendment for affirmative action programs that have not yet been tested in court. As an initial matter, the Court notes that defendants have cited no cases suggesting that a state's abundance of caution can, by itself, constitute an important interest that would justify a gender classification. Even assuming that such an interest could justify a gender classification, Proposition 209 is a hopelessly overbroad means to that end. Proposition 209, far from being limited to affirmative action programs implemented by state agencies that have not been tested in court, prohibits all preferences, whether at the state or municipal level, and whether tested or untested in court.

3. Conclusion

The Court turns finally to defendants' *reductio ad absurdum* attack on the plaintiffs' equal protection argument. Defendants submit that the *Seattle* and *Hunter* cases cannot be read to invalidate Proposition 209, because such a reading would necessarily lead to an absurd reordering of the relationship between states and subordinate local government units. According to this argument, if

the Court accepts plaintiffs' position, such a holding would, in effect, permit local governmental bodies to preempt state authority on any racial or gender issue, at least where the local entity has acted to confer a benefit on minorities or women.

In making this argument, defendants rely primarily on concerns expressed by Justice Powell in his dissenting opinion in *Seattle*, 458 U.S. at 494-95, 498 n. 14, 102 S.Ct. at 3207-08, 3210 n. 14. As the majority in that case pointed out, however, the difficult dilemma posed by Justice Powell was not presented by Initiative 350. *Id.* at 480 n. 23, 102 S.Ct. at 3200 n. 23. Similarly, the dilemma posed by defendants does not follow from plaintiffs' equal protection claim in the instant case. Nothing about plaintiffs' argument requires that the state of California be forever barred from addressing a race- or gender-conscious affirmative action program where a local authority has acted first. The *Seattle-Hunter* doctrine merely regulates the *manner* of any state intervention, preventing the state from nonneutrally reordering the political process to burden the interests of minorities or women. A state, for example, remains free to restructure the political process in a neutral manner, even where such a change indirectly burdens the political participation of women and minorities. A state may also intercede where it can articulate a justification that survives equal protection scrutiny. What a state may not do, according to the *Seattle-Hunter* doctrine, is single out an issue of special interest to minorities and women and require that such legislation run a unique political gauntlet.

Plaintiffs' argument does not require that, once supporters of race- and gender-conscious affirmative action have suceeded at the ballot box, their victory can never be undone. Nothing in the Constitution requires that the political system guarantee victory to those who support affirmative action. The body that enacts an affirmative action measure is free, of course, to repeal it.[35] *See Crawford*, 458 U.S. at 539, 102 S.Ct. at 3218-19. In short, those who support race- and gender-conscious affirmative action must compete within the neutral rules of the political process – the 14th Amendment expects that in the democratic struggle, the interests of minorities and women will sometimes prevail, and will sometimes be defeated. *See Hunter*, 393 U.S. at 394, 89 S.Ct. at 562 (Harlan, J., concurring) (noting that neutral rules structuring the political process "will sometimes operate in favor of one faction; sometimes in favor of another").

Once those who support race- and gender-conscious affirmative action prevail at one level of government, however, the Equal Protection Clause will not tolerate an effort by the vanquished parties to alter the rules of the game – solely with respect to this single issue – so as to secure a reversal of fortunes. Plaintiffs have borne their burden of showing that Proposition 209, by removing

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[35] The University of California, for example, has acted on its own accord to discontinue the use of race and gender preferences in admissions, contracting, and employment decisions. Pls. Exh. 11 (discussing Regents Resolutions SP-1 and SP-2). Governor Wilson has also issued an executive order repealing race- and gender-conscious affirmative action programs under his immediate control. Defendants' Request for Judicial Notice, Exh. 2 (Executive Order W-124-95, June 1, 1995).

authority over race- and gender-conscious affirmative action to "a new and remote" level of government, has precisely such an effect. Such a reordering of the political process is tantamount to vote dilution in the most literal sense: the relevant voting pool is effectively expanded until the prior victory is undone. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (holding that a state may not impair the voting rights of minorities under the guise of reapportionment). Where such a political restructuring is aimed at a subject of particular interest to minorities and women, it is particularly problematic, and the Equal Protection Clause demands that it be subjected to heightened judicial scrutiny. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection in the most literal sense." *Romer v. Evans*, ___ U.S. ___, ___, 116 S.Ct. 1620, 1628, 134 L.Ed.2d 855 (1996).

For the reasons set forth above, the Court finds that plaintiffs have demonstrated a probability of success on the merits of their equal protection claim.

B. Likelihood of Success on Plaintiffs' Preemption Claims

1. Introduction

Plaintiffs assert that Proposition 209 violates the Supremacy Clause of the United States Constitution by proscribing governmental entities from voluntarily employing race- and gender-conscious affirmative action as a remedy for the effects of past and present discrimination. Plaintiffs base their contention on the hypothesis

that Congress intended to preserve voluntary affirmative action as a means to attain the goals embodied in three federal civil rights acts – Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.[36] By outlawing race- and gender-conscious affirmative action, plaintiffs argue, Proposition 209 conflicts and interferes with the objectives of the three federal civil rights acts. Consequently, plaintiffs conclude that Proposition 209 must be invalidated by the Supremacy Clause of the United States Constitution.

Article VI of the United States Constitution states, in part, "[t]his Constitution and the Laws of the United States . . . shall be the supreme Law of the Land." In general, preemption is not to be lightly presumed under the Supremacy Clause. *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 281, 107 S.Ct. 683, 689-90, 93 L.Ed.2d 613 (1987). Nevertheless, the Supremacy Clause has been interpreted to require preemption of state laws in certain circumstances.[37] The Supreme Court has

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[36] Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d *et seq*. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e et seq. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance. 20 U.S.C. § 1681.

[37] Here, the state law being challenged under the Supremacy Clause is an amendment to the California Constitution, the most puissant of state laws; that fact however is irrelevant in a preemption analysis. Under the Supremacy Clause, "[t]he relative importance to the State of its own law is

enunciated two basic doctrines of preemption: conflict preemption and field preemption.

2. Preemption of State Law by Title VII
a. Field Preemption

Plaintiffs raise no field preemption claim and Congress plainly did not intend to "fill the field" of employment antidiscrimination law when it enacted Title VII. 42 U.S.C. § 2000h-4 ("Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of state laws on the same subject matter . . . "); *See Guerra*, 479 U.S. at 282, 107 S.Ct. at 690.[38]

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not material when there is a conflict with federal law. . . . [a]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180 (1962).

[38] The doctrine of field preemption commands that a state law yield when it operates in an area where the " 'scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' " *English v. General Electric Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)).

b. Conflict Preemption

Conflict preemption bars the application of any state law that contravenes federal law. This type of preemption occurs when an individual or entity cannot simultaneously conform to state and federal law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963). When compliance with both federal and state law is impossible the state law must relent. *California v. ARC America Corp.*, 490 U.S. 93, 100, 109 S.Ct. 1661, 1664-65, 104 L.Ed.2d 86 (1989) (quoting *Florida Lime*, 373 U.S. at 142-143, 83 S.Ct. at 1217-1218).

State law is also preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *International Paper Co. v. Ouellette*, 479 U.S. 481, 492, 107 S.Ct. 805, 811, 93 L.Ed.2d 883 (1987) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)). As under other forms of preemption, the ultimate touchstone of an obstacle preemption analysis is the Congressional purpose embodied in the federal legislation. *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 290, 106 S.Ct. 1057, 1063, 89 L.Ed.2d 223 (1986). Obstacle preemption, however, further requires a court to examine the methods Congress has chosen to achieve its purposes. To the extent a state law interferes with the manner in which Congress intended the federal law to operate, the state law is preempted – even where the state and federal laws share common goals. *Gade v. National*

Solid Wastes Management Ass'n., 505 U.S. 88, 103, 112 S.Ct. 2374, 2385-86, 120 L.Ed.2d 73 (1992).[39]

i. Actual Conflict Preemption

Plaintiffs contend that Proposition 209 is in actual conflict with Title VII. *See Florida Lime*, 373 U.S. at

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[39] The Court notes that many of the cases employing obstacle preemption involve federal laws in areas where Congress has so fully regulated that the courts could nearly conclude that Congress left no room for states to legislate. *See, e.g., Gade*, 505 U.S. at 104, n. 2, 112 S.Ct. at 2386, n. 2 ("Although we have chosen to use the term 'conflict' preemption, we could as easily have stated that the promulgation of a federal safety and health standard 'pre-empts the field . . . ' "); *Hines*, 312 U.S. at 66, 61 S.Ct. at 404 ("[F]ederal government, in the exercise of its superior authority in [the field of regulation of aliens] has enacted a complete scheme of regulation . . . "); *Gould*, 475 U.S. at 286, 106 S.Ct. at 1061 ("It is now commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations."). It is apparent, however, that the application of obstacle preemption is not limited to circumstances where Congress has nearly filled the field. The Supreme Court has employed this form of preemption in fields where states are explicitly permitted to legislate. *See, e.g., Michigan Canners and Freezers Ass'n., Inc. v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 469, 104 S.Ct. 2518, 2522-23, 81 L.Ed.2d 399 (1984) (Michigan Agricultural Marketing and Bargaining Act preempted by Agricultural Fair Practices Act (AFPA), despite the fact that AFPA reflects no congressional intent to occupy the field); *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) (Wisconsin notice-of-claim statute interferes with the purpose of Congress in enacting § 1983); *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 105 S.Ct. 695, 83 L.Ed.2d 635 (1985) (Payment in Lieu of Taxes Act preempts South Dakota statute which obstructs congressional purpose).

142-143, 83 S.Ct. at 1217-1218. To establish that an entity cannot simultaneously comply with both Title VII and Proposition 209, a plaintiff must demonstrate that some action required by Title VII simultaneously violates Proposition 209. Plaintiffs argue that, at times, voluntarily-adopted race- or gender-conscious remedies are the *sole* means of compliance with Title VII, and therefore Proposition 209 must be preempted under Florida Lime. Plaintiffs sole citation regarding this supposition is the First Circuit's review of the Boston Police Department's consent decree under the standard enunciated in *Croson*. *Stuart v. Roache*, 951 F.2d 446 (1st Cir.1991). While Stuart presents a factual predicate that likely could have served as the basis for a successful Title VII action, it is by no means obvious that the development of an affirmative action plan was the *only* alternative available that would have allowed the police department to avoid liability. *Cf.* 42 U.S.C. 2000e-2(j).

Plaintiffs further argue that Proposition 209 is in actual conflict with Title VII because that an entity might not be able to comply simultaneously with Proposition 209 and a court order pursuant to Title VII that mandates a race- or gender-conscious remedy.[40] Plaintiffs have not

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[40] Subdivision (d) of Proposition 209 permits race- and gender-conscious affirmative action pursuant to court orders and consent decrees predating the enactment of Proposition 209, but makes no exception for orders or consent decrees entered after the Proposition 209 effective date. CAL. CONST. art. 1, § 31(d) ("Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.").

demonstrated that the "actual conflict" preemption doctrine of Florida Lime applies with equal force when an entity cannot concurrently obey the dictates of state law and a court order pursuant to a federal law.[41]

ii. Obstacle Preemption

Plaintiffs further urge this Court to find that Proposition 209 runs afoul of the obstacle preemption doctrine because it interferes with the congressional purposes embodied in Title VII. Before this Court can find that Proposition 209 "stands as an obstacle" to the fulfillment of Congressional purposes, it must determine that one of those purposes was to preserve voluntary race- and gender-conscious affirmative action as an option for employers under Title VII. Merely showing that such affirmative action is *permissible* under Title VII is insufficient to support a finding of preemption. If Congress did not intend to preserve voluntary affirmative action as an option, and if such affirmative action is simply one of several equally effective means available to reach the

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[41] The Court's preliminary investigation of actual conflict preemption cases only reveals factual circumstances where an entity was trapped between a state and a federal law. No cases discussed the application of actual conflict preemption where an entity was unable to comply simultaneously with a state law and a remedy imposed by a court pursuant to a federal law. *See, e.g., Hook v. State of Ariz.*, 907 F.Supp. 1326, 1340-41 (D.Ariz.1995) (Court rejects defendants' defense that it was "legally impossible" to comply with federal court orders and an Arizona statute). For the foregoing reasons the Court finds that plaintiffs have not demonstrated a likelihood of success on the merits of their claim that Proposition 209 actually conflicts with Title VII.

goals of Title VII, banning voluntary affirmative action would not impede the realization of Congress' purpose.

While plaintiffs must demonstrate more than the *permissibility* of voluntary race- and gender-conscious affirmative action, they need not, as defendants suggest, show that affirmative action is *mandated* by Title VII. Rather, demonstrating either that (1) the discretion to utilize voluntary affirmative action is necessary to achieve the objectives of Congress or (2) such affirmative action is a method Congress intended to preserve under Title VII is sufficient to establish that the prohibition of affirmative action would interfere with Congressional intent.

The primary source of Congressional intent is the plain language of the statute. Unfortunately, the statutory language of Title VII fails to address whether Congress intended to preserve the option of utilizing voluntary race- and gender-conscious affirmative action. The sole reference to race- and gender-based preferences in Title VII simply indicates that Title VII should not be construed to *require* the adoption of preferences. 42 U.S.C. § 2000e-2(j) ("Nothing contained in this subchapter shall be interpreted to require any [entity] . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group . . . ").[42]

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[42] The Supreme Court's consideration of Congress' intent regarding affirmative action under Title VII has been limited to determining whether affirmative action is, at times, required under the statute and whether Title VII permits affirmative

Because Title VII is silent on the issue of Congress' intent regarding the role of voluntary race- and gender-conscious affirmative action under the Title VII schema, this Court must turn to the Equal Employment Opportunity Commission's ("EEOC") interpretation of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 2781-2782, 81 L.Ed.2d 694 (1984) ("If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

The EEOC Guideline explaining the role of voluntary affirmative action under Title VII states: "Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII." 29 C.F.R. § 1608.1(c). The EEOC guideline recognizes that

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action. *See, e.g., Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 644, 107 S.Ct. 1442, 1458, 94 L.Ed.2d 615 (1987) (Stevens, J., concurring) ("It remains clear that the Act does not *require* any employer to grant preferential treatment. . . . ") (emphasis in original); *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 208, 99 S.Ct. 2721, 2729, 61 L.Ed.2d 480 (1979) ("We therefore hold that Title VII's prohibition . . . against racial discrimination does not condemn all private, voluntary affirmative action programs."); *Local 28 of Sheet Metal Workers' Intern. Ass'n v. E.E.O.C.*, 478 U.S. 421, 464, 106 S.Ct. 3019, 3044, 92 L.Ed.2d 344 (1986) ("Our examination of the legislative policy behind Title VII leads us to conclude that Congress did not intend to prohibit a court from [ordering affirmative action in appropriate circumstances] . . . ").

Congress intended, as one of its central objectives, to encourage voluntary compliance with the statute. "The principle of nondiscrimination in employment . . . and the principle that each person subject to Title VII should take voluntary action to correct the effects of past discrimination . . . without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of Title VII." *Id.* The EEOC has thus concluded that permitting voluntary affirmative action is crucial if entities are to comply voluntarily with Title VII: "The importance of voluntary affirmative action on the part of employers is underscored by Title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations – all of which emphasize voluntary action to achieve equal employment opportunity." 29 C.F.R. § 1607.17(1).

The EEOC guidelines, which were developed to clarify "uncertainty as to the meaning and application of Title VII, [which could] threaten the accomplishment of the clear Congressional intent to encourage affirmative action," 29 C.F.R. 1608.1(a), reveal that Congress intended to safeguard the discretion to employ voluntary race- and gender-conscious affirmative action as a means to allow "flexibility in modifying employment systems to comport with the purposes of Title VII." 29 C.F.R. 1608.1(c).

A court must give substantial deference to all enforcing agency's reasonable explications of a statute. *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, ___, 115 S.Ct. 810, 813, 130 L.Ed.2d 740 (1995) ("It is well settled that courts should give great weight to any reasonable construction of a regulatory

statute adopted by the agency charged with enforcement of the statute."); *Chevron*, 467 U.S. at 845, 104 S.Ct. at 2783 (quoting *U.S. v. Shimer*, 367 U.S. 374, 382, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961)). Courts have not hesitated to show deference to agencies in the context of a preemption analysis. The Supreme Court, for example, in finding that a South Dakota statute was preempted by the federal Payment in Lieu of Taxes Act, gave "substantial deference" to the Department of Interior's construction of the federal statute. *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 105 S.Ct. 695, 83 L.Ed.2d 635 (1985); *See also Retirement Fund Trust of Plumbing v. Franchise Tax Bd.*, 909 F.2d 1266, 1284-1286 (9th Cir.1990) (court places significant reliance on Treasury Department's interpretation of ERISA to find that federal law does not preempt California Employment Development Department's withholding procedure); *California Hosp. Ass'n v. Henning*, 770 F.2d 856 (9th Cir.1985) (modified, 783 F.2d 946 (9th Cir.1986)) (relying on Department of Labor's regulation clarifying Congress' intentions in adopting ERISA, court finds that California statute not preempted.); *cf. Southern Pacific Transp. Co. v. Public Service Com'n of Nevada*, 909 F.2d 352, 356 (9th Cir.1990) (appellate court reverses district court's preemption analysis because "district court failed to accord sufficient deference to the Department of Transportation's construction of its own regulations").

The Supreme Court has generally given the same level of deference to the EEOC's interpretations of Title VII as it gives to other agency interpretations of statutes they are charged with enforcing. For example, in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761, 99 S.Ct. 2066, 2074, 60 L.Ed.2d 609 (1979), the Supreme Court stated

that the EEOC guidelines are entitled to "great deference." *See also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431, 95 S.Ct. 2362, 2378, 45 L.Ed.2d 280 (1975); *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94, 94 S.Ct. 334, 339, 38 L.Ed.2d 287 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434, 91 S.Ct. 849, 854-855, 28 L.Ed.2d 158 (1971). Those holdings were reaffirmed in *E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107, 115, 108 S.Ct. 1666, 1671, 100 L.Ed.2d 96 (1988) ("It is *axiomatic* that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards . . . [it] need only be reasonable to be entitled to deference.") (emphasis added).[43]

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[43] In a subsequent case involving the EEOC guidelines, the Supreme Court drifted from its strong precedents requiring deference to agency interpretations. Justice Rehnquist, without reference to Commercial Office Products or the other post-Chevron holdings giving substantial deference to the EEOC guidelines, and solely drawing upon his own pre-Chevron opinion in *General Elec. Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), determined that "the level of deference afforded [to an EEOC Guideline] 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' " *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 257, 111 S.Ct. 1227, 1235, 113 L.Ed.2d 274 (1991). Justice Scalia, concurring, reproaches Justice Rehnquist for disregarding the Court's precedent: "In an era when our treatment of agency positions is governed by Chevron the *'legislative rules v. other action'* dichotomy of Gilbert is an anachronism; and it is not even a correct description of that anachronism to say that Gilbert held that the EEOC . . . is not entitled to deference." *Id.* at 260, 111 S.Ct. at 1236. For the

As explained below, the EEOC conclusion that Congress intended to preserve the option to utilize race- and gender-conscious affirmative action under Title VII surpasses the standard of reasonableness.[44] *See, e.g., Local*

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reasons that follow, this Court determines that, in this context, the EEOC Guidelines must be accorded, under the Arabian Oil test, the same substantial deference as required by Commercial Office Products. There is no evidence that the EEOC gave the two guidelines at issue here, which are comprehensive statements on Congress' intent regarding the use of affirmative action under Title VII, anything less than thorough consideration. The reasoning of the EEOC is coherent and is supported by the plain language and legislative history of the statute. In the thirty years since the passage of Title VII no agency interpretation of Title VII has drawn a conclusion inconsistent with those reached in the current EEOC guidelines. Finally the persuasive value of the guidelines at issued is enhanced by the fact that they function as a legal safe harbor for any person taking action in good faith reliance on the Guidelines. The Court finds that the EEOC Guidelines at issue here amply fulfil the requirements under Arabian Oil and must be given substantial deference.

[44] The proposition that the EEOC Guidelines are indicative of Congress' intent is strengthened by the fact that Congress has made no effort to modify or overturn the Guidelines in the twenty years following their promulgation. This does not suggest that Congressional inaction is somehow determinative; the Supreme Court, however, has "often taken Congress' subsequent inaction as probative to varying degrees." *Patterson v. McLean Credit Union*, 491 U.S. 164, 200, 109 S.Ct. 2363, 2385, 105 L.Ed.2d 132 (1989) (Brennan, J., concurring in part, dissenting in part). In the context of Title VII, the Supreme Court has noted that the barriers of the legislative process do not adequately explain a failure of Congress to act. "[W]hen Congress has been displeased with our interpretation of Title VII, it has not hesitated to amend the statute to tell us so." *Johnson*, 480 U.S. at 629 n. 7, 107 S.Ct. at 1450 n. 7.

No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. at 516, 106 S.Ct. at 3072.

The EEOC's conclusion is based on a two-tiered rationale: (1) Congress intended voluntary compliance to be a purpose of Title VII, and (2) that the preservation of voluntary affirmative action is central to that compliance. The EEOC rationale is consistent with court decisions that have found that permitting voluntary compliance is integral to the purposes of Title VII. *Local No. 93*, 478 U.S. at 515, 106 S.Ct. at 3071 ("Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII."); Weber, 443 U.S. at 204, 99 S.Ct. at 2727-28 ("The very statutory words [were] intended as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' ").

The EEOC's corollary finding that voluntary affirmative action is not merely permissible, but essential to allow voluntary compliance is also buttressed by Supreme Court interpretation of Title VII. According to the Supreme Court, "the imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. . . . This result would clearly be at odds with this Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law.' " *Wygant*, 476 U.S. at 290, 106 S.Ct. at 1855 (O'Connor, J., concurring); *accord Local 93*, 478 U.S. at 516, 106

S.Ct. at 3072 (quoting EEOC guideline that states voluntary affirmative action must be "encouraged and protected" in the context of a finding that "Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII").

In sum, the EEOC Guidelines explicitly state that Congress intended to "encourage and protect" voluntary affirmative action as a method to achieve the objectives of Title VII. It is manifest from the Guidelines and the jurisprudence supporting their rationale that Congress meant to preserve the option to comply voluntarily with Title VII and that the capacity to utilize race- and gender-conscious affirmative action is fundamental to maintaining the potential of voluntary compliance. The EEOC's interpretation of Title VII compels this Court to find that Congress intended to preserve discretion for employers to utilize voluntary affirmative action.[45]

The Defendant-Intervenors argue that even if Congress intended to preserve the discretion to use race- and gender-conscious affirmative action under Title VII, Proposition 209 merely reflects California's decision not to exercise that discretion. The plain language of Title VII and the rationales behind voluntary affirmative action's role under the statute, however, necessitate the conclusion that Congress intended that the discretion to use race- and gender-conscious preferences be exercised employer level.

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[45] Recognizing the importance of the EEOC guideline in making this finding and the unique position held by the EEOC in interpreting Title VII, this Court invites the EEOC to submit an *amicus* brief.

Congress created the alternative to use voluntary affirmative action as a method of voluntary compliance with Title VII that would not engender further liability. As noted on several occasions by the Supreme Court, Title VII could potentially have put employers in the untenable position between Title VII liability for past acts of discrimination and Title VII liability for future preferences to remedy discrimination. *See, e.g., Wygant*, 476 U.S. at 291, 106 S.Ct. at 1856 (O'Connor, J., concurring) ("[P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken."); *Weber*, 443 U.S. at 210, 99 S.Ct. at 2730 (Blackmun, J., concurring) ("If Title VII is read literally, on the one hand [employers] face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.").

While the plain language of Title VII places employers between these equally perilous alternatives, voluntary affirmative action affords a safe passage. *See Johnson*, 480 U.S. at 645, 107 S.Ct. at 1459 (Stevens, J., concurring) ("The logic of antidiscrimination legislation requires that judicial constructions of Title VII leave 'breathing room' for employer initiatives to benefit members of minority groups."). It follows that Congress intended the persons or entities potentially liable under Title VII to be entrusted with the power to avail

themselves of the safe passage provided by voluntary affirmative action.[46]

This conclusion is supported by the legislative history of Title VII. When enacting Title VII, Congress chose neither to mandate nor prohibit the use of affirmative action; instead it decided to leave determinations regarding the appropriateness of affirmative action to persons making the day-to-day employment decisions. "[T]he problems raised by these controversial questions [surrounding preferential treatment and quotas in employment] are more properly handled at a governmental level closer to the American people and by communities and individuals themselves." *Weber*, 443 U.S. at 207 n. 7, 99 S.Ct. at 2729 n. 7 (quoting 110 Cong.Rec. 15893 (1964)); *Local 93*, 478 U.S. at 520, 106 S.Ct. at 3074 (quoting H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1962)) (noting that key support for Title VII was only obtained after it was apparent that "management prerogatives, and

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[46] Those liable under Title VII are limited to "employers." In general, an employer under Title VII is, at a minimum, a person who has a modicum of control over the statutorily required number of employees. *See Magnuson v. Peak Technical Services, Inc.*, 808 F.Supp. 500 (E.D.Va.1992) (For the purposes of Title VII, "employer" encompasses those persons who control aspects of individual's compensation, terms, conditions, or privileges of employment.); *Ryals v. Mobile County Sheriff's Dept.*, 839 F.Supp. 25 (S.D.Ala.1993) (Alabama County not employer of deputy sheriff under Title VII absent evidence that county had any control over any area of deputy's employment. Fact that county issued checks for deputies was insufficient to confer employer status.).

union freedoms [were] to be left undisturbed to the greatest extent possible").[47]

The State of California is not subject to employer liability under Title VII for all past and present discriminatory actions taken against all state, local, and municipal public employees in the state nor does the State of California make the day-to-day decisions regarding the public employees in California. As a result, Congress could not have intended that the State of California would be the appropriate body to exercise, on behalf of every individual public employer in California, the discretion to use voluntary race- and gender-conscious affirmative action.

c. Conclusion

In light of the EEOC Guideline and supporting case law, we conclude that Congress intended to protect employers' discretion to utilize race- and gender-conscious affirmative action as a method of complying with their obligations under Title VII. Proposition 209, by eliminating the discretion to utilize race- and gender-conscious affirmative action, contravenes this Congressional purpose. Further, Congress intended to allow employers to use affirmative action as a safe passage to compliance with Title VII. Proposition 209 obstructs the passageway

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[47] While these legislative comments occurred during the 1964 enactment of Title VII when it covered only private employers, "there is also no indication that Congress intended to leave governmental employers with less latitude under Title VII than had been left to employers in the private sector when Title VII was originally enacted." *Local* 93, 478 U.S. at 520 n. 10, 106 S.Ct. at 3074 n. 10.

and forces many employers into a place akin to the Strait of Messina where they confront the Scylla of Title VII and Charybdis of Proposition 209. Proposition 209, therefore, also contravenes Congress' intent regarding the use of affirmative action as a method to achieve the goals of Title VII.

For these reasons, this Court finds that plaintiffs have demonstrated a likelihood of prevailing on the theory that Proposition 209 violates the Supremacy Clause under the doctrine of obstacle preemption.[48]

3. Preemption of State Law by Titles VI and IX

Plaintiffs further contend that Proposition 209 violates the Supremacy Clause by interfering with the purposes and methods of Titles VI and IX. In order to establish a likelihood of prevailing on this theory, plaintiffs must show, just as they must show in the Title VII context, that Congress intended to accord voluntary race- and gender-conscious affirmative action a hallowed position within the structure of Titles VI and IX.

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[48] Subdivision (h) of Proposition 209 states "[i]f any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section." The Court recognizes that Title VII only applies to employment relationships, while Proposition 209 applies to employment, contracting, and education. It would be premature, however, to address questions regarding severance at this preliminary stage of the proceedings.

As in the Title VII context, nothing on the face of Titles VI or IX indicates that Congress intended to maintain voluntary affirmative action under the two statutes.[49] As noted above, where a statute is silent, a court must look for guidance from the agencies charged with enforcing the statute. Agency interpretations of Titles VI and IX have addressed some aspects of affirmative action, but have not reached the question of whether Congress intended the statutes to preserve the option of using voluntary affirmative action.

Agency regulations, on the one hand, state that in some instances, Title VI and IX regulations *require* the use of affirmative action, "[i]n administering a program which the recipient has previously discriminated against persons . . . the recipient must take affirmative action to

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[49] The legislative history of Title VI contains one reference to the importance of voluntary compliance with the statute, but does not address whether voluntary affirmative action is central to compliance with Title VI. *See* H.R.REP. No. 914(II), 88th Cong., 1st Sess. 25-26 (1964); H.R.REP. No. 914(I), 88th Cong. 1st Sess. 25 (1964). The Supreme Court has only examined affirmative action under Titles VI and IX in limited contexts. Two pluralities have held that Title VI is not violated by a constitutionally permissible affirmative action program. *Fullilove v. Klutznick*, 448 U.S. 448, 492 n. 77, 100 S.Ct. 2758, 2781 n. 77, 65 L.Ed.2d 902 (1980) (opinion of Burger, C.J.); *id.* at 517, n. 15, 100 S.Ct. at 2794, n. 15 (Powell, J., concurring); *id.* at 517, n. 1, 100 S.Ct. at 2795, n. 1 (Marshall, J., concurring); Bakke, 438 U.S. at 287, 98 S.Ct. at 2746-47 (opinion of Powell, J.); *id.* at 341, n. 17, 98 S.Ct. at 2775 n. 17 (Brennan, J., concurring in part, dissenting in part). In the context of Title IX, the First Circuit recently determined that "[l]ike other anti-discrimination statutory schemes, the Title IX regime permits affirmative action." *Cohen v. Brown University*, 101 F.3d 155 (1st Cir.1996).

overcome the effects of prior discrimination." 34 C.F.R. § 100.3(b)(6)(i); 34 C.F.R. § 106.3(a) ("[i]f the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex . . . such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.").

A showing that affirmative action is, at times, required under Title VI and IX cannot support a finding of preemption. Failure to comply with Titles VI and IX generally results in a cessation of federal funds. Consequently, affirmative action that is required by Titles VI and IX is permissible under Proposition 209. Cal. Const. art. 1, § 31(e) ("Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state."). Because Proposition 209 allows required actions under Titles VI and IX no conflict could transpire between actions required by the statutes and Proposition 209.

The regulations interpreting Title VI and IX also discuss the *permissive* use of affirmative action. "Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(6)(ii); 34 C.F.R. § 106.3(b) ("[i]n the absence of a finding of discrimination on the basis of sex . . . a recipient may take affirmative actions to overcome the effect of conditions which

resulted in limited participation therein by persons of a particular sex.").

The mere fact that affirmative action is permissible under the Title VI and IX regulations, and some judicial interpretation, does not require preemption of a state law that prohibits affirmative action. Simply obstructing an action that is allowed under federal law does not, in itself, raise preemption concerns unless there is some showing that the action is necessary to fulfilling the purposes of the federal law. The plain language and agency interpretations of Titles VI and IX do not establish that any Congressional purposes are thwarted by Proposition 209.

Recognizing the shortcomings of the typical sources of Congressional intent regarding the role of voluntary affirmative action under Titles VI and IX, plaintiffs attempt to employ interpretations of Title VII as a means to elucidate the legislative intent behind Titles VI and IX. It is apparent, however, that the intent and purposes of Titles VI and IX, which must be the central focus for preemption purposes, are not identical to those of Title VII. When Title VI was passed, "Congress was legislating to assure federal funds would not be used in an improper manner. Title VII, by contrast, was enacted pursuant to the commerce power. . . . Title VII and Title VI, therefore, cannot be read in pari materia" in all contexts. Weber, 443 U.S. at 206 n. 6, 99 S.Ct. at 2729 n. 6. Likewise, Title IX was enacted under Congress' spending power and also cannot be read as precisely parallel to Title VII.[50]

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[50] Plaintiffs footnote two Ninth Circuit cases and several regulations which adopt Title VII's disparate impact test in the

It is especially clear that plaintiffs cannot rely on Title VII to establish Congress' intent regarding Titles VI and IX in the context of affirmative action. The Supreme Court has already noted that Congress had differing intentions for what constitutes permissible affirmative action under the three statutes: "[W]e do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans." *Johnson*, 480 U.S. at 632, 107 S.Ct. at 1452. Meanwhile, the constraints of Title VI parallel those established by the Constitution. *Bakke*, 438 U.S. at 285, 98 S.Ct. at 2745-46. Further, unlike under the Title VI paradigm, the standard for what constitutes permissible affirmative action under Title IX cannot be based on current Constitutional limitations.[51]

The statutory language, agency interpretation, and legislative history of Titles VI and IX do not establish that

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context of Titles VI and IX. *Larry P. v. Riles*, 793 F.2d 969 (9th Cir.1984); *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir.1994). While this may show that comparable actions will engender liability under Titles VI, VII, and IX, it does not reveal Congress' intent regarding the role of voluntary affirmative action under the three statutes.

[51] Congress' intent regarding affirmative action under Title IX was manifested when the statute was enacted in 1972 – well in advance of the currently controlling Constitutional standard of heightened scrutiny for gender classifications. *See U.S. v. Virginia*, ___ U.S. at ___-___, 116 S.Ct. at 2275-2276 (tracing history of heightened scrutiny for gender classifications). Consequently, unlike Title VI, where Congress intended to track the standards of the Fourteenth Amendment, Congress could not have intended to import the Fourteenth Amendment standards for gender into Title IX.

Congress intended to preserve voluntary race- and gender-conscious affirmative action as an option for entities covered by the two statutes. It is apparent, moreover, that plaintiffs cannot rely on the methods Congress chose to effectuate Title VII to establish that Proposition 209 is preempted by Titles VI and IX. Consequently, plaintiffs have failed to demonstrate to the Court a likelihood of success on the merits of their claim that Proposition 209 violates the Supremacy Clause because it stands as an obstacle to the methods Congress intended entities to employ in furthering the purposes of Titles VI and IX.

C. Irreparable Injury

As noted above, plaintiffs have demonstrated a probability of success on the merits of their equal protection claim. They have also demonstrated a likelihood of success on one of their preemption claims. Although some courts have held that this showing sufficiently demonstrates a possibility of irreparable harm, *see, e.g., Bery v. City of New York*, 97 F.3d 689, 693-94 (2d Cir.1996), the Court will separately address this issue, focusing both on the irreparability and the immediacy of the harm alleged by plaintiffs.

Where the deprivation of a constitutional right is involved, courts generally hold that no further showing of irreparability is required. *See Associated Gen. Contractors*, 950 F.2d at 1412; 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2948.1. The Court is satisfied, at least with respect to plaintiffs' equal protection claim, that the deprivation of a constitutional right – "the right to full participation in the

political life of the community" – is squarely at issue in the present case. *Seattle*, 458 U.S. at 467, 102 S.Ct. at 3193. To the extent Proposition 209 imposes a new and substantial political burden on those, and only those, who support race- and gender-conscious affirmative action, it inflicts an immediate and ongoing injury that is not amenable to monetary remedy. The very real threat that the enforcement and implementation of Proposition 209 may lead to the dismantling of existing, otherwise constitutional, affirmative action programs also constitutes an irreparable harm to members of the plaintiff class.

Turning to the imminence of the alleged injury, the Court is also satisfied that plaintiffs have shown that injury to members of the plaintiff class is not only possible, but almost certain, in the absence of a preliminary injunction. Proposition 209 is self-executing, and thus immediately binding on all state and local governmental units. The defendant class representatives, Governor Wilson and Attorney General Lungren, have, for their part, made plain their intention to implement Proposition 209 as expeditiously as possible, and have taken a number of preliminary steps to that end. The University of California system has also indicated its intention, in the absence of a preliminary injunction, to implement Proposition 209 immediately. Other members of the defendant class have also announced their intention, in the absence of an injunction, to modify their activities in accordance with Proposition 209. In addition, a number of private suits have been brought against defendant class members in state court challenging existing affirmative action programs, including suits brought by Governor Wilson and defendant-intervenor CADP. Perhaps

most importantly, the Court notes that the core equal protection injury identified by plaintiffs – impaired access to the political process at all levels of state and local government – would, in the absence of a preliminary injunction, be felt by the plaintiff class immediately.

The balance of hardships, moreover, tips decidedly in plaintiffs' favor. In contrast to the injury outlined above, a preliminary injunction would impose little hardship on members of the defendant class, who would merely be required to suspend their Proposition 209 implementation plans pending trial.[52]

The public interest also favors the entry of a preliminary injunction. As an initial matter, a number of named defendants have urged this Court to act swiftly and give clear guidance with respect to Proposition 209. This request, of course, is neutral with respect to the granting or denial of the present motion. Nonetheless, the Court believes the preservation of the pre-election status quo not only serves the public need for plain guidance, but also harmonizes that interest with the compelling interest in remedying discrimination that underlies existing constitutionally-permissible state-sponsored affirmative action programs threatened by Proposition 209.

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[52] Defendants argue that a state has a strong interest in seeing that legitimate enactments, especially at the constitutional level, not be stymied. Defendants certainly cannot, however, contend that the state has a strong interest in enforcing a measure that violates the United States Constitution. Because that is the very issue of the present suit, defendants invocation of this strong state interest is somewhat premature.

VI. CONCLUSION

Based on the foregoing Findings and Conclusions, this Court rules that:

(1) Plaintiffs have standing to bring this action.

(2) Plaintiffs have demonstrated a probability of success on their claim that Proposition 209 violates the Fourteenth Amendment's equal protection guarantee to full participation in the political life of the community.

(3) Plaintiffs have failed to demonstrate a likelihood of success on their claim that Proposition 209 violates the Supremacy Clause because it conflicts with, and thus is preempted by, Titles VI and IX of the 1964 Civil Rights Act.

(4) Plaintiffs have demonstrated a likelihood of success on their claim that Proposition 209 violates the Supremacy Clause because it conflicts with, and thus is preempted by, Title VII of the 1964 Civil Rights Act.

(5) Plaintiffs have demonstrated that a preliminary injunction is necessary to protect the plaintiff class from the possibility of irreparable injury.

Accordingly, and good cause appearing, it is HEREBY ORDERED pursuant to Fed.R.Civ.P. 65 that defendants Governor Pete Wilson and Attorney General Dan Lungren and all members of the defendant class that they represent, and their officers, agents, servants, employees and attorneys, and those in active concert or participation with them, are restrained and enjoined, pending trial or final judgment in this action, from implementing or enforcing Proposition 209 insofar as said amendment to the Constitution of the State of California

purports to prohibit or affect affirmative action programs in public employment, public education or public contracting.

The aforesaid preliminary injunction shall not preclude the following:

1. all defendants, including members of the defendant class, from identifying, reviewing and analyzing existing affirmative action programs.[53]

2. all defendants, including members of the defendant class, from defending private actions seeking remedies under Article 1, section 31 of the California Constitution.

3. proceedings in pending state court actions related to Article 1, section 31, including, *Wilson v. State Personnel Bd., Sacramento County Superior Court No. 96 CS01082* and *Californians Against Discrimination and Preferences, Inc. v. The Bd. of Governors of the Calif. Community Colleges*, Sacramento County Superior Court, No. 96 CS03010, and

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[53] The preliminary injunction does not, of course, interfere with the ability of any defendant or member of the defendant class to *voluntarily* adopt, retain, amend or repeal an affirmative action program. It does preclude any defendant or member of the defendant class from taking any action with respect to an affirmative action program in order to enforce, implement, or otherwise comply with, Proposition 209.

4. the California Attorney General from defending Article 1, section 31 in any legal proceeding challenging its validity under the United States Constitution.[54]

IT IS SO ORDERED.

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[54] Defendants have not requested that plaintiffs post a bond pursuant to FED.R.CIV.P. 65(c). This Court agrees that in this case it is appropriate to waive the bond requirement. *See generally Crowley v. Local No. 82*, 679 F.2d 978, 1000 (1st Cir.1982); *Canterbury Career School, Inc. v. Riley*, 833 F.Supp. 1097, 1106 (D.N.J.1993).

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE COALITION FOR ECONOMIC EQUITY; CALIFORNIA NAACP; NORTHERN CALIFORNIA NAACP; CALIFORNIA LABOR FEDERATION; AFL-CIO; COUNCIL OF ASIAN AMERICAN BUSINESS ASSOCIATIONS, CALIFORNIA; CHINESE AMERICAN CITIZENS' ALLIANCE; WOMEN CONSTRUCTION BUSINESS OWNERS AND EXECUTIVES, CALIFORNIA CHAPTER; UNITED MINORITY BUSINESS ENTREPRENEURS; CHINESE FOR AFFIRMATIVE ACTION; BLACK ADVOCATES IN STATE SERVICE; ASIAN PACIFIC AMERICAN LABOR ALLIANCE; LA VOZ CHICANA; BLACK CHAMBER OF COMMERCE OF CALIFORNIA; MICHELE BENNETT; NANCY BURNS; FLOYD CHAVEZ; CHRISTOPHER CLAY; DANA CUNNINGHAM; IRAN CELESTE DAVILA; SHEVADE DOVE, nfr Melodie Dove; JESSICA LOPEZ; VIRGINIA MOSQUEDA; SALVADOR OCHOA; CLIFFORD TONG,	)	Nos. 97-15030, 97-15031 D.C. No. CV-96-4024-TEH ORDER (Filed Aug. 21, 1997)

Plaintiffs/Appellees,

v.

PETE WILSON, Governor; DANIEL E. LUNGREN, Attorney General for the State of California; JOANNE CORDAY KOZBERG, Secretary of State and Consumer Services Agency and Cabinet Member; JAMES GOMEZ, Dir Dept of Corr,

Defendants/Appellants.

and

CALIFORNIANS AGAINST DISCRIMINATION AND PREFERENCES, INC.,

Defendant-Intervenor/ Appellant.

Before: O'SCANNLAIN, LEAVY and KLEINFELD, Circuit Judges.

The Opinion filed on April 8, 1997, is amended as follows:

1. On slip opinion page 3892, line 2 of caption, replace "LUNDGREN" with "LUNGREN."

2. On slip opinion, page 3897, line 1 of COUNSEL, insert "Daniel E. Lungren, Attorney General; Floyd D. Shimomura, Senior Assistant Attorney General; Linda A. Cabatic, Supervising Deputy Attorney General; Marsha A. Bedwell, Deputy Attorney General;" before "Paul H. Dobson. . . ."

3. On slip opinion, page 3898, replace lines 1-3 with "Michael A. Carvin, Charles J. Cooper, Michael W. Kirk, David H. Thompson, Cooper & Carvin, Washington, D.C.; Michael E. Rosman, Hans Bader, Center for Individual Rights, Washington D.C.; and Manuel S. Klausner, Los Angeles, California, for defendant-intervenor/appellant Californians Against Discrimination and Preferences, Inc."

4. On slip opinion, page 3898, replace lines 4-6 with "Mark D. Rosenbaum, Daniel P. Tokaji, ACLU Foundation of Southern California, Los Angeles, California; Edward Chen, ACLU Foundation of Northern California, San Francisco California; and Evan H. Caminker, UCLA School of Law, Los Angeles, California, for plaintiffs/appellees Coalition for Economic Equity, et al."

5. On slip opinion, page 3899, line 1, replace "Olsen" with "Olson".

6. On slip opinion, page 3906, line 11, delete ", at least in theory".

7. On slip opinion, page 3906, line 15, replace "district judge" with "court."

8. On slip opinion, page 3907, line 1, replace "district judge" with "court".

9. On slip opinion, page 3907, line 8, insert "These principles of judicial review are no less true today than in the days of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *see, e.g., Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (*upholding* district court injunction against state-wide initiative measure)."

10. On slip opinion page 3908, line 2, replace *"Lundgren"* with *"Lungren"*.

With these amendments, the panel has voted to deny Plaintiffs/Appellees' petition for rehearing and to reject the suggestion for rehearing en banc.

The motion of Mary Francis Berry, A. Leon Higginbotham, Yvonne Y. Lee and Cruz Reynoso for leave to file a letter brief joining in the request for rehearing en banc is DENIED as moot.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE COALITION FOR ECONOMIC EQUITY; CALIFORNIA NAACP; NORTHERN CALIFORNIA NAACP; CALIFORNIA LABOR FEDERATION; AFL-CIO; COUNCIL OF ASIAN AMERICAN BUSINESS ASSOCIATIONS, CALIFORNIA; CHINESE AMERICAN CITIZENS' ALLIANCE; WOMEN CONSTRUCTION BUSINESS OWNERS AND EXECUTIVES, CALIFORNIA CHAPTER; UNITED MINORITY BUSINESS ENTREPRENEURS; CHINESE FOR AFFIRMATIVE ACTION; BLACK ADVOCATES IN STATE SERVICE; ASIAN PACIFIC AMERICAN LABOR ALLIANCE; LA VOZ CHICANA; BLACK CHAMBER OF COMMERCE OF CALIFORNIA; MICHELE BENNETT; NANCY BURNS; FLOYD CHAVEZ; CHRISTOPHER CLAY; DANA CUNNINGHAM; IRAN CELESTE DAVILA; SHEVADE DOVE, nfr Melodie Dove; JESSICA LOPEZ; VIRGINIA MOSQUEDA;	)	Nos. 97-15030, 97-15031 D.C. No. CV-96-4024-TEH ORDER (Filed Aug. 26, 1997)

SALVADOR OCHOA; CLIFFORD TONG,

Plaintiffs/Appellees,

v.

PETE WILSON, Governor; DANIEL E. LUNGREN, Attorney General for the State of California; JOANNE CORDAY KOZBERG, Secretary of State and Consumer Services Agency and Cabinet Member; JAMES GOMEZ, Dir Dept of Corr,

Defendants/Appellants,

and

CALIFORNIANS AGAINST DISCRIMINATION AND PREFERENCES, INC.,

Defendant-Intervenor/ Appellant.

Before: O'SCANNLAIN, LEAVY and KLEINFELD, Circuit Judges.

Defendant City and County of San Francisco ("San Francisco"). Defendant County of Marin ("Marin"), and all Plaintiffs-Appellees, except California Labor Federation, (together called "Applicants") have filed emergency motions applying for a stay of the mandate in this case pending petition to the Supreme Court of the United States for writ of certiorari. Notwithstanding that San Francisco and Marin are not parties to the appeal, we grant them leave to file the emergency motions. Briefs in

opposition to the emergency motions were filed by Defendants-Appellants Pete Wilson, Governor, et al. (the "State"), and Defendant-Intervenor Californians Against Discrimination and Preferences, Inc. ("CADP").

We have take [sic] into consideration all of the filings and the relevant principles which apply to the decision of a court of appeals to grant a stay of its mandate, which, in this case, would be tantamount to extending the preliminary injunction entered by the district court on December 23, 1996, which we have already held rests on an erroneous legal premise. *See Netherland v. Tuggle*, 116 S. Ct. 4, 5 (1995) (vacating stay where court of appeals failed to apply required three-part test for granting stay) (citing *Barefoot v. Estelle*, 462 U.S. 880 (1983)); *see also Maggio v. Williams*, 464 U.S. 46, 48 (1983).

We are particularly mindful that:

1) A three judge panel of this court held that, as a matter of law, Proposition 209 does not violate the United States Constitution. The active judges of this court voted to leave that judgment undisturbed in rejecting the suggestion for rehearing en banc.

2) There is no inter-Circuit conflict on the law governing this case. *See* Supr.Ct.R. 10(a).

3) Applicants have failed to identify any other traditional criteria employed by the Supreme Court in granting certiorari. Notwithstanding their assertions, we are simply not persuaded that the decision conflicts with any decision of the Supreme Court. *See* Supr.Ct.R. 10(c).

Further, balancing the equities, we are persuaded that the State has demonstrated the clear possibility of

irreparable injury to its citizens if a stay of the mandate is granted; it is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("It also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *see also Campbell v. Wood*, 20 F.3d 1050, 1051 (9th Cir. 1994).

For the foregoing reasons, the emergency motions for stay of mandate pending petition to the Supreme Court for writ of certiorari are denied without prejudice to renewing such motions before the Supreme Court.

The mandate shall issue in the normal course, seven days after the date on which the order denying the petition for rehearing was entered.

APPENDIX E

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives – Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. Disqualification to hold office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. Public debt not to be questioned – Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e. Definitions

For the purposes of this title [42 USCS §§ 2000e et seq.] –

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, United States Code [11 USCS §§ 1 et seq.], or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102) of title 5 of the United States Code [5 USCS § 2102]), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [Internal Revenue Code of 1986] except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organizations) is (A) twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], or (B) fifteen or more thereafter, and such labor organization –

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered a local labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) has the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence

shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title [42 USCS § 2000e-2(h)] shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

* * *

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices. It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-

job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religions. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other

educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations. As used in this title [42 U.S.C. §§ 2000e et seq.], the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National security. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if –

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title [42 USCS §§ 2000e et seq.] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Businesses or enterprises extending preferential treatment to Indians. Nothing contained in this title [42 USCS §§ 2000e et seq.] shall apply to any business or enterprise on or near an Indian reservation with respect

to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance. Nothing contained in this title [42 USCS §§ 2000e et seq.] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USCS §§ 2000e et seq.] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

* * *

§ 2000e-7. Effect on State laws

Nothing in this title [42 USCS §§ 2000e et seq.] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision

of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title [42 USCS §§ 2000e et seq.].

* * *

§ 2000h-4. State authority

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of Sate law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

* * *

29 CFR § 1608.1. "The principle of nondiscrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to Title VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of Title VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII." § 1608.1(c)

THE CODE OF THE LAWS
OF THE
UNITED STATES OF AMERICA
TITLE 42 – THE PUBLIC HEALTH AND WELFARE

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§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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§ 31. Prohibition against affirmative action by public entities

(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(b) This section shall apply only to action taken after the section's effective date.

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

(f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California anti-discrimination law.

(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Addition adopted by voters, Prop 209, effective November 6, 1996.

APPENDIX F

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE COALITION FOR ECONOMIC EQUITY; CALIFORNIA NAACP; NORTHERN CALIFORNIA NAACP; CALIFORNIA LABOR FEDERATION; AFL-CIO; COUNCIL OF ASIAN AMERICAN BUSINESS ASSOCIATIONS, CALIFORNIA; CHINESE AMERICAN CITIZENS' ALLIANCE; WOMEN CONSTRUCTION BUSINESS OWNERS AND EXECUTIVES, CALIFORNIA CHAPTER; UNITED MINORITY BUSINESS ENTREPRENEURS; CHINESE FOR AFFIRMATIVE ACTION; BLACK ADVOCATES IN STATE SERVICE; ASIAN PACIFIC AMERICAN LABOR ALLIANCE; LA VOZ CHICANA; BLACK CHAMBER OF COMMERCE OF CALIFORNIA; MICHELE BENNETT; NANCY BURNS; FLOYD CHAVEZ; CHRISTOPHER CLAY; DANA CUNNINGHAM; IRAN CELESTE DAVILA; SHEVADE DOVE, nfr Melodie Dove; JESSICA LOPEZ; VIRGINIA MOSQUEDA;	)	Nos. 97-15030, 97-15031 D.C. No. CV-96-4024-TEH ORDER (Filed Aug. 28, 1997)

SALVADOR OCHOA; CLIFFORD TONG,

Plaintiffs/Appellees,

v.

PETE WILSON, Governor; DANIEL E. LUNGREN, Attorney General for the State of California; JOANNE CORDAY KOZBERG, Secretary of State and Consumer Services Agency and Cabinet Member; JAMES GOMEZ, Dir Dept of Corr,

Defendants/Appellants.

and

CALIFORNIANS AGAINST DISCRIMINATION AND PREFERENCES, INC.,

Defendant-Intervenor/ Appellant.

Before: O'SCANNLAIN, LEAVY and KLEINFELD, Circuit Judges.

The clerk is directed to issue the mandate pursuant to Fed. R. App. P. 41(a).

The order filed August 21, 1997, rejecting the suggestion for rehearing en banc is amended to include the dissent from the denial of rehearing en banc of Judge Schroeder, in which Judge Pregerson, Judge Norris and Judge Tashima concur, the opinion of Judge Norris respecting the denial of rehearing en banc, in which Judge Schroeder, Judge Pregerson and Judge Tashima

concur, and the opinion of Judge Hawkins commenting on the denial of rehearing en banc. Judge Reinhardt was recused from this case and did not participate in the proceedings.

SCHROEDER, Circuit Judge, with whom PREGERSON, NORRIS and TASHIMA, Circuit Judges, join, dissenting from denial of rehearing en banc:

I respectfully dissent from the court's decision not to review this case *en banc*. *En banc* review was warranted in this case for two reasons.

First, the case is extraordinarily important. In upholding the constitutionality of California Proposition 209, which forbids the state to offer any preferential treatment in employment, education, or contracting on the basis of race or gender, the case has put equal protection law in a state of turmoil. At stake is whether the voters may bar the state's institutions from using narrowly tailored race- or gender-based remedies which serve compelling state interests, including redressing the effects of past racial and gender-based discrimination by those very institutions.

Second, the decision is contrary to controlling Supreme Court precedent. Proposition 209 puts only race- or gender-based remedies for past discrimination, and no other state preferences, beyond the reach of the legislative or any other process, save another state initiative. The Supreme Court has squarely held that a state violates the Constitution when it attempts to put legislative remedies which benefit minorities at a remote level of government beyond the ordinary legislative process. *See*

Washington v. Seattle School District, No. 1, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969).

The panel opinion, *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997) ("*CEE II*"), treats the case as if the state were merely repealing past remedies that it had determined were not constitutionally required. *See id.* at 1443 (citing *Crawford v. Board of Educ.*, 458 U.S. 527, 538 (1982)). Proposition 209, however, is not merely a repeal of past remedies; it is a bar to future remedies to curb injustice. *See Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480, 1508 (N.D.Cal. 1996) ("*CEE I*") ("Proposition 209, by its terms, not only repeals all existing state and local affirmative action programs, but also prohibits the adoption of such programs in the future. In so doing, Proposition 209 displaces authority with respect to a race and gender issue to 'a new and remote level of government,' and thus reorders the political process to the detriment of women and minorities.") (quoting *Seattle Sch. Dist.*, 458 U.S. at 483).

The panel is also incorrect when it characterizes the ordinance as "adopting the Equal Protection Clause." *CEE II*, 110 F.3d at 1446 (quoting *Crawford*, 458 U.S. at 535). Unlike the amendment in *Crawford*, Prop. 209 does not merely conform California law to the federal constitution. *See Crawford*, 458 U.S. at 535. Rather, it is specifically designed to bar remedies that are permissible under the Equal Protection Clause. *See CEE I*, 946 F.Supp. at 1489. Otherwise, the Proposition would be a nullity. *See id.*

The concept of judicial review is a constitutional check on the excesses of majority rule. *See Marbury v.*

Madison, 5 U.S. (1 Cranch) 137, 175-77 (1803); The Federalist No. 78 (Hamilton), at 466-70 (Clinton Rossiter ed., 1961). The responsible exercise of judicial review requires courage and vigilance. I would affirm District Judge Henderson's fine opinion in *CEE I*.

NORRIS, Circuit Judge, with whom SCHROEDER, PREGERSON and TASHIMA, Circuit Judges, join, respecting the denial of rehearing en banc:

In *Hunter v. Erickson*, 393 U.S. 385 (1969), Justice John Harlen stated a constitutional principle for the protection of racial minorities from discriminatory treatment within the political process. Justice Harlan wrote that "a provision that has the clear purpose of making it more difficult for racial . . . minorities to achieve legislation that is in their interest . . . is discriminatory on its face." *Id.* at 395 (Harlan, J., concurring). In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the full Court adopted Justice Harlan's reasoning, holding that whenever the state "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area [of government]," it has utilized an impermissible "racial classification" in restructuring the political process. *Id.* at 470, 480 (citing Justice Harlan's *Hunter* concurrence). It is the core holding of these cases that the state may not "place special burdens on the ability of minority groups to achieve beneficial legislation . . . by lodging decisionmaking authority over the question at a new and remote level of government." *Id.* at 467, 483. Because that is precisely what Proposition 209 does, our court has no legitimate choice but to declare it unconstitutional. Unless and until the Supreme Court overrules *Hunter* and *Seattle*. California simply does not

have the constitutional authority to place minority groups at a disadvantage in the political process.

Proposition 209 strips the state legislature and all political subdivisions such as city councils, county boards of supervisors, local school boards, and the Board of Regents of the University of California, of all authority to adopt racial preference in the future. It "lodg[es] decisionmaking authority over [affirmative action] at a new and remote level of government" – the entire electorate of California. The measure thereby deprives the proponents of affirmative action – and only the proponents of affirmative action – of the ordinary benefits of representative government. The AARP can go to a city council tomorrow and request special incentives to attract older Americans to the municipal workforce; the VFW can lobby the state legislature for special employment or housing incentives on behalf of veterans; Marian Wright Edelman can lobby for preferential health benefits for children at all levels of state and local government. Advocates of racial preferences, in contrast, may no longer appeal to a city council or the Board of Regents, or even to the state legislature. They must take their case directly to the voters of California.

It is hard to imagine a more onerous burden in the political process than mounting a statewide initiative campaign. As the district court recognized, "substantial funds are required to organize and fund the statewide campaign" that is necessary to get an initiative passed. *See Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480, 1498-99 (N.D. Cal. 1996). California has a population of some thirty-two million people. The cost of delivering a message to that entire electorate is staggering. The

Proposition 209 campaign itself cost over three million dollars, with most of the funds going to "television, radio, print advertising, and direct mail." *Id.* Proposition 209 now places that obstruction before every effort to enact affirmative action programs. It effectively shuts off all debate over racial preferences in the halls of representative government, depriving minorities even of the *opportunity* to persuade their elected and appointed officials that affirmative action programs make sense as a matter of social policy when they are narrowly tailored to achieve compelling remedial objectives.[1]

The *Coalition* panel does not dispute that affirmative action programs confer benefits primarily upon minorities, nor does it dispute that Proposition 209 places special obstacles in the way of those programs. "We accept without question," the panel writes, "the district court's findings that Proposition 209 burdens members of insular minorities within the majority that enacted it who otherwise would seek to obtain race-based and gender-based preferential treatment from local entities." *Coalition for*

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[1] As the Supreme Court has made clear, a race-based preference program may be a constitutional means of remedying discrimination.

> The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and the government is not disqualified from acting in response to it. . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases.

Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995).

Economic Equity v. Wilson [CEE v. Wilson], 110 F.3d 1431, 1442 (9th Cir. 1997). Notwithstanding its recognition that Proposition 209 places special burdens on minority groups in the political process, the panel holds that the measure is constitutional. It reaches this result, I submit, in violation of its duty to follow controlling Supreme Court precedent.

I

The panel justifies its result by drawing a distinction between affirmative action programs and antidiscrimination laws that has no place in *Hunter-Seattle* analysis. It rationalizes this by characterizing all affirmative action programs as inherently discriminatory – even those that pass constitutional muster under the Fourteenth Amendment. The Equal Protection Clause is aimed at securing equality, the panel complains, and so affirmative action programs are not worthy of protection under the *Hunter-Seattle* doctrine because – in the panel's opinion – they do not secure "equal treatment." *CEE v. Wilson*, 110 F.3d at 1445. The panel uses its distinction to argue that *Hunter* and *Seattle* are categorically inapplicable to race-based preferences, and, in doing so, ignores the Supreme Court's clear mandate that *Hunter* and *Seattle* shall apply to *all* constitutional legislation that "inures primarily to the benefit of the minority." *Seattle*, 458 U.S. at 472.

In resting its decision on the view that affirmative action programs do not secure "equality," the panel injects into *Hunter-Seattle* analysis a test that looks to the personal views of individual judges about the relative

merits of affirmative action programs and antidiscrimination laws. There is absolutely no reason to believe that the Supreme Court intended any such result. The relevant inquiry under *Hunter* and *Seattle* is simply to ask whether legislation is *beneficial to minorities*. *See Hunter*, 393 U.S. at 392-93; *id.* at 395 (Harlan, J., concurring); *Seattle*, 458 U.S. at 472. The Court used language that is broad and unqualified. Nowhere has the Court suggested that the *Hunter-Seattle* doctrine permits judges to rely upon their own subjective impressions as to whether a particular measure aimed at benefiting minorities is also an effective means of securing equality, or whether the social costs associated with that measure are worth the potential benefits.

Indeed, the panel's distinction between antidiscrimination laws and race-based remedial programs is squarely rejected by *Seattle*. There, the Court followed *Hunter* in striking down a Washington statute that forbade local school districts from using busing to remedy de facto school segregation. Of course, the very busing program that gave rise to the case was itself a controversial, race-based remedial program. Under the Seattle busing plan, students were assigned to schools – and bussed accordingly – on the basis of their race. *See Seattle*, 458 U.S. at 461, 473-74. The *Seattle* Court held that this race-based remedial program was entitled to the same constitutional protection that the *Hunter* Court afforded to antidiscrimination laws. Both types of law were "beneficial" to minorities, and both hold a common goal: to "overcome the 'special condition' of prejudice" and remedy the injustices that have resulted from slavery and its legacy, racial discrimination. *See Seattle*, 458 U.S. at 486 (*quoting*

U.S. v. Carolene Prods., 304 U.S. 144, 153 n.4 (1938)). The Court further held that the political controversy that enveloped the Seattle busing plan was not a proper factor for a court to consider in rendering a constitutional decision. Rather, it instructed, "in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process. *For present purposes, it is enough that minorities may consider busing for integration to be 'legislation that is in their interest.'* " *Seattle*, 458 U.S. at 474 (quoting Justice Harlan's concurrence in *Hunter*) (emphasis added).

The panel's distinction, in contrast, has the effect of transforming constitutional analysis into an arena for political debate over the "desirability and efficacy" of affirmative action. The panel "distinguishes" affirmative action programs, even though the panel agrees that such programs constitute legislation that is beneficial to minorities, because it thinks that affirmative action does not in fact promote "equality." It deploys the full rhetorical arsenal developed by the opponents of affirmative action, characterizing such programs as "inherently invidious" instances of reverse discrimination, *CEE v. Wilson*, 110 F.3d at 1445 n.16, and proclaiming that all affirmative action programs constitute disfavored legislation, whether or not they are constitutional. *See id.* at 1445. The *proponents* of affirmative action, responding on the level of social policy, would no doubt argue that such programs do in fact secure equality because they level the playing field by remedying the inequalities that are the product of the long history of state-sponsored discrimination that followed the Civil War. This is the rhetorical

framework within which the debate over affirmative action has unfolded in the halls of American government. As a political manifesto, the panel's opinion could comfortably assume a place on one side of that debate. As a document that purports to apply the Constitution as interpreted by the Supreme Court, however, the opinion fails at its appointed task.

The question of the constitutionality of Proposition 209 has nothing to do with the wisdom of affirmative action programs. The *Hunter-Seattle* doctrine does not call for judges to determine whether constitutionally permissible, beneficial programs are also wise and just means of securing equality. Rather, the "equality" that the *Hunter-Seattle* doctrine secures is the equality of *opportunity* that the Constitution guarantees to minority groups to use the channels of representative government to "achieve legislation that is in their interest." *Hunter*, 393 U.S. at 395 (Harlan, J., concurring).

II

The panel offers a number of other, subsidiary arguments in its attempt to distinguish *Hunter* and *Seattle*. These arguments are no more convincing than the panel's attempt to inject a subjective "equality" test into the *Hunter-Seattle* doctrine.

A

The panel first appeals to the common-sense notion that legislatures should not be "constitutionally *required*"

by courts to pursue any particular legislative policy or program.

> To hold that a democratically enacted affirmative action program is constitutionally permissible because the people have demonstrated a compelling state interest is hardly to hold that the program is constitutionally required. The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.

CEE v. Wilson, 110 F.3d at 1446.

As the panel must have understood, the district court did not hold that any particular legislation, including race-based preference programs, was "constitutionally required." The *Hunter-Seattle* doctrine does not *ask* whether any particular legislation is ever constitutionally required. The Supreme Court did not hold that either the antidiscrimination laws in *Hunter* or the remedial busing program in *Seattle* was constitutionally required. What the Court did hold is that states may not place political obstacles in the way of laws that favor minorities, nor may they remove such laws wholesale from the political process. All that is constitutionally required is that minorities have the *opportunity*, on equal terms, to seek "legislation in [their] behalf" within existing channels of government. *Hunter*, 393 U.S. at 392-93.

B

The panel next suggests that Proposition 209 does not implicate the *Hunter-Seattle* doctrine because, in fact, it does not selectively restructure the political process. The

panel argues that by forbidding race-related programs in employment, education, and contracting at *every* level of representative government – rather than doing so at only one level, as in *Seattle* – the State has "addresse[d] in neutral fashion race-related and gender-related matters" and so has not offended *Hunter* or *Seattle*. *CEE v. Wilson*, 110 F.3d at 1444.

Once again, the panel makes an argument that finds no support in law or reason. The *Hunter-Seattle* doctrine holds that it works an injury upon minorities to subject them to a structural disadvantage in the political process. It therefore forbids the State from "differentiat[ing] between the treatment of problems involving racial matters and that afforded other problems in the same area." *Seattle*, 458 U.S. at 480 (citations omitted). In *Seattle*, as the panel correctly observes, the State of Washington had inflicted this injury upon minorities at only one level of government: local school districts. What the panel suggests is that if the State inflicts a *Hunter-Seattle* injury at *every* level of representative government and "differentiates between the treatment of problems involving racial matters and that afforded other problems" in local school boards *and* city councils *and* the state legislature *and* state agencies such as the University of California Board of Regents, then the constitutional error is somehow cured. *See CEE v. Wilson*, 110 F.3d at 1443-44. Neither *Hunter* nor *Seattle* – nor common sense, for that matter – supports the proposition that *expanding* the levels at which the State

disadvantages minorities will render that action any less constitutionally suspect.[2]

C

Next the panel would have us believe that *Hunter* and *Seattle* are inapposite because Proposition 209 burdens *majority*, not minority, interests.[3] In putting forward this remarkable argument, the panel seizes upon a statement in *Hunter* that "[t]he majority needs no protection against discrimination." *Hunter*, 393 U.S. at 391; *CEE v. Wilson*, 110 F.3d at 1441. It then puts its own spin on the word "majority" by turning women and racial minorities into one undifferentiated "group." *See id.* at 1441-43. In other words, the panel transforms racial minorities into a numerical majority by lumping them together with

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[2] In making this extraordinary argument, the panel appears to rely exclusively upon language that it quotes out of context from a footnote in *Seattle* that discusses the distribution of authority between state and local governments in Washington. *See Seattle*, 458 U.S. at 479 n.22 ("We also note that the State has not attempted to reserve to itself exclusive power to deal with racial issues generally."); *CEE v. Wilson*, 110 F.3d at 1444. This attempt is unavailing. *Seattle* clearly held that "when the political process or the decisionmaking mechanism used to address racially conscious legislation – and only such legislation – is singled out for peculiar and disadvantageous treatment, the government action plainly rests on distinctions based on race." *Seattle*, 458 U.S. at 485-86.

[3] Even the Attorney General of the State of California, in defending Proposition 209, was not prepared to make this argument. It is advanced only by intervenor Californians Against Discrimination and Preferences, Inc. *See CEE v. Wilson*, 110 F.3d at 1441.

women. Presto! Proposition 209 burdens the interests of the majority, not the minority. To borrow the panel's (uncited) paraphrase of Justice Scalia, "if merely stating this alleged 'equal protection' [argument] does not suffice to refute it, our constitutional jurisprudence" has gone very far astray. *See id.* at 1439 (*quoting but not citing Romer v. Evans*, 116 S. Ct. 1620, 1630 (1995) (Scalia, J., dissenting)).[4]

D

Finally, the panel turns to *Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527 (1982), in its attempt to distinguish *Hunter* and *Seattle*. *See CEE v. Wilson*, 110 F.3d at 1443, 1445-46. For the same reason that the *Hunter-Seattle* doctrine controls this case, however, *Crawford* has no bearing upon the constitutionality of Proposition 209.

Crawford's focus is on the difference between the "mere repeal" of existing, minority-oriented legislation and the systematic obstruction of such legislation in the future. It holds that a "mere repeal," unlike systematic

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[4] Curiously, after devoting three pages of its opinion to the enthusiastic development of the argument that Proposition 209 burdens majority, not minority, interests, the panel disclaims any reliance upon it, instead "accept[ing] without questioning the District Court's findings that Proposition 209 burdens members of insular minorities within the majority that enacted it who otherwise would seek to obtain race-based and gender-based preferential treatment from local entities." *CEE v. Wilson*, 110 F.3d at 1441-43, 1442.

obstruction, does not violate equal protection. In *Crawford*, the people of California amended their Constitution to do away with a substantive right that the state's Equal Protection Clause had conferred above and beyond what was required by the Federal Constitution: the right to be free from de facto segregation in the public schools. The new amendment effectively repealed this right by rendering it unenforceable in state court. *See id.* at 529-35. In rejecting a *Hunter-Seattle* challenge to that amendment, the Supreme Court held that "the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies." *Id.* at 538. Thus, *Crawford* permits the states to repeal any existing affirmative action programs, even though the repeal might operate to the detriment of minorities, so long as they do not *prospectively* disadvantage minorities in the political process.

Proposition 209, of course, is not a mere repeal of existing affirmative action programs. Had the initiative simply repealed all such programs throughout the state and left minority groups free to lobby the institutions of representative government for their reenactment, then *Crawford* might well control this case. Proposition 209 does much more, however: It forbids all institutions of representative government from enacting race- or gender-based affirmative action programs – and only those programs – *in the future*. A measure that places permanent political obstacles in the way of minority-oriented legislation violates the *Hunter-Seattle* doctrine and cannot fit itself within the "mere repeal" doctrine of *Crawford*.

III

When a federal court disregards Supreme Court precedent, it jeopardizes the foundation upon which the entire judiciary rests in our constitutional system of government. The power of the federal courts "lies . . . in [their] legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 865 (1992) (Joint Opinion of O'Connor, Kennedy, and Souter, JJ.). Faithful adherence to precedent does not always come easily. "Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal." *Id.* at 867. Even the broad mantle of protection that Article III offers cannot completely shield federal judges from these heavy costs. We must sometimes implement precedent that comes into conflict with our most deeply held personal convictions. In those instances, for judges as much as anyone else, "[a]n extra price will be paid by those who themselves disapprove of the decision's results when viewed outside of constitutional terms." *Id.* at 867-68. I would never minimize or belittle the burden that judges must bear when they are presented with a fundamental issue of conscience and called upon by binding Supreme Court precedent to render a decision whose substantive result violates their deeply held convictions.

It is the responsibility of *all* federal judges, however, to "struggle to accept [that burden]." *Id.* at 868. We must do so "because [we] respect the rule of law." *Id.* It is the

particular responsibility of the judges of lower federal courts, moreover, to abide by the precedent that binds us without regard to changes in the political climate of the Nation – or even changes in the sentiment of the Supreme Court – that we think might cast a favorable eye upon a different result. "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Ouijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989). The federal courts of appeals are neither final nor infallible,[5] and our duty is more constrained than we might sometimes wish it to be.

I submit, with all due respect, that the *Coalition* panel has neglected this duty in favor of a path of conservative judicial activism. Its failure to hold Proposition 209 unconstitutional on the authority of *Hunter* and *Seattle* is unsupportable as a matter of law. I deeply regret that a majority of our active judges – some, perhaps, assuming that the Supreme Court will correct the panel's error – has failed to vote to rehear this case en banc.

HAWKINS, Circuit Judge, commenting on the denial of rehearing en banc:

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[5] *See Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in judgment) ("We are not final because we are infallible, but we are infallible only because we are final.").

The panel was faced with the task of filtering a citizen initiative through its understanding and interpretation of the Constitution. Apparently because the panel believed there was no recent authority directly on point, it chose to do what courts often must do: interpret and apply existing authority to the legal challenge presented. At the end of the day, that is the same task in which the district court was engaged. I have no doubt that both the district court and my colleagues on the panel acted in the utmost good faith in doing so. But therein lies an interesting and important question of jurisprudence. It has nothing to do with the merits of affirmative action; it has everything to do with the way in which courts subject to review by higher authority carry out their duties. It is about the proper role of an inferior court faced with contrary, but apparently controlling, precedent that is honestly and earnestly believes will not be followed (or will be distinguished) by higher authority. Is it the role (the duty, if you will) of a court in that circumstances to attempt to accurately predict what the higher authority will do? Or is its duty to faithfully follow existing precedent? If an inferior court in such a circumstance is free to predict what the higher court will do, then this panel probably got the issue right.[1] If, however,

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[1] For an analysis of the theory of predictionism, see Richard A. Posner, *The Problems of Jurisprudence* 221-28 (1990). For a case in which a circuit court engaged in such precedent-defying predictionism and was criticized by the Supreme Court for doing so, see *Rodriguez de Ouijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989) (Kennedy, J.), *aff'g Rodriguez de Ouijas v. Shearson/Lehman Bros.*, 845 F.2d 1296, 1298-99 (5th Cir. 1988).

the duty of a lower court is to faithfully apply existing authority, then I have seen no persuasive argument that contradicts Judge Norris' *Carolene Products-Hunter-Seattle* analysis.[2]

The Supreme Court may well tell us that this case is not governed by that line of authority or that an exception to the application of those cases should be made for this particular measure. Until that happens, it is not our role to predict – however accurate our predictions might turn out to be.[3]

---

[2] Justice Stevens, dissenting in *Rodriguez*, described the Fifth Circuit's decision as "an indefensible brand of judicial activism." 490 U.S. at 486 (1989) (Stevens, J., dissenting).

[3] "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez*, 490 U.S. at 484 (Kennedy, J.). *Accord Agostini v. Felton*, ___ U.S. ___, 117 S. Ct. 1997, 2017 (1997) (O'Connor, J.).

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In The

Supreme Court of the United States

October Term, 1996

COALITION FOR ECONOMIC EQUITY, et al.,

v. *Petitioners,*

PETE WILSON, Governor of the State of California, et al.,

Respondents,

CALIFORNIANS AGAINST DISCRIMINATION AND PREFERENCES, INC.,

Intervenor/Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

It is beyond dispute that our society has not yet succeeded in eliminating the "unhappy persistence of both the practice and the lingering effects of racial discrimination." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995). Minorities and women competing for public contracts and seeking public employment continue in many cases to be burdened by "the sorry history of both public and private discrimination in this country." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989). This Court has held that under certain limited circumstances, local governments may – and in some situations, must – engage in race-conscious affirmative action to remedy that history of discrimination. *See, e.g., id.* at 491-92; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277, 280 (1986).

Proposition 209 is an amendment to the California Constitution that alters the political process in California by forbidding local governments from engaging in some forms of constitutionally permissible affirmative action. Indeed, the State's Governor and Attorney General have repeatedly asserted that Proposition 209 prevents a local government from engaging even in those race- and gender-conscious programs necessary to remedy a local government's own discriminatory practices. Proposition 209 purports to make these fundamental changes in a way that disadvantages only certain groups – racial minorities and women. As the petition for a writ of certiorari filed by the Coalition for Economic Equity ("the Coalition") makes clear, by skewing the political process to the disadvantage of minorities and women, Proposition 209 violates the Equal Protection Clause. For this reason, and

because of the substantial harm Proposition 209 will cause victims of discrimination in California, the City and County of San Francisco ("San Francisco"), the County of Marin ("Marin"), and the City of Pasadena ("Pasadena") support the Coalition's petition for a writ of certiorari.

In addition, San Francisco, Marin and Pasadena urge this Court to grant the petition because the Ninth Circuit's decision upholding Proposition 209 plunges local governments into a dilemma of constitutional significance. This Court has long recognized the predicament faced by local governments considering remedial affirmative action programs: they are "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent . . . discrimination and liability to non-minorities if affirmative action *is* taken." *Wygant*, 476 U.S. at 291 (1986) (O'Connor, J., concurring) (emphasis in original).[1] The Ninth Circuit's decision sharpens this dilemma, as this case and other litigation filed since the passage of Proposition 209 amply illustrate. Local governments in California need this Court's guidance to determine when local governments have the authority to implement voluntary affirmative action programs.

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[1] Except as otherwise noted in this brief, all emphasis in quoted material has been added.

STATEMENT OF THE CASE

I. The Status In This Litigation Of San Francisco, Marin And Pasadena

San Francisco administers several affirmative action programs. One such program grants bid preferences to certain local, minority- and woman-owned business enterprises ("MBEs and WBEs") competing for many of San Francisco's contracts. The program is codified as a Chapter 12D of the San Francisco Administrative Code ("the MWBE Ordinance" or "the Ordinance").[2]

To comply with this Court's ruling in *Croson*, San Francisco based the Ordinance on overwhelming statistical and anecdotal evidence of a history of discrimination against MBEs and WBEs. *See Associated General Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991) (finding that San Francisco was likely to prevail on the merits of an Equal Protection challenge to its Ordinance), *cert. denied*, 503 U.S. 985 (1992). That evidence demonstrated both that San Francisco had directly discriminated against MBEs and WBEs, and that "discrimination in the private sector against MBEs and WBEs [had been] manifested in and exacerbated by the City's procurement practices." *Id.* at 1414-15. The evidence also demonstrated that San Francisco had

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[2] Appendix A to this brief contains the version of the MWBE Ordinance in effect at the time this litigation was filed. The Ordinance was scheduled to expire on June 30, 1997. On May 30, 1997, San Francisco adopted Ordinance 210-97, which extended the MWBE Ordinance's expiration date to December 31, 1997, based on additional legislative findings. Ordinance 210-97 is attached as Appendix B.

employed race-neutral measures in an effort to remedy the history of discrimination, but that those measures had proven to be ineffective. *Id.* at 1417.

On November 5, 1996, the voters of the State of California adopted Proposition 209.[3] The next day, the Coalition challenged Proposition 209 on constitutional grounds. The Coalition named as defendants Governor Wilson, Attorney General Lungren ("the State defendants" or "the State"), certain other public officials, and several local public entities including San Francisco, Marin and Pasadena.

Early in this litigation the State made clear that it interpreted Proposition 209 to invalidate San Francisco's Ordinance. Contrary to the State's position, San Francisco believes that it has a duty under the Equal Protection Clause to continue to implement its Ordinance until San Francisco has remedied the effects of past discrimination. Accordingly, although the Coalition named San Francisco as a *defendant*, San Francisco has sided with and submitted evidence in support of the Coalition both in the district court and the court of appeals. In both courts below, Marin has joined in San Francisco's briefs, and Pasadena has filed briefs supporting San Francisco's position.

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[3] The full text of Proposition 209 is included in the Coalition's Appendix E at pages E-15 and E-16. San Francisco, Marin and Pasadena rely on, and therefore do not duplicate, the Appendices submitted by the Coalition.

II. The Procedural History of This Litigation

On November 27, 1996, the district court granted the Coalition's motion for a temporary restraining order. The district court also certified a class of plaintiffs of "all persons or entities who on account of race, sex, color, ethnicity, or national origin, are or will be adversely affected by Proposition 209. . . . " The temporary restraining order prevented the State defendants from implementing or enforcing Proposition 209 pending a hearing on a preliminary injunction.

On December 16, 1996, the district court granted the Coalition's motion to certify a defendant class of "all state officials, local government entities or other governmental instrumentalities bound by Proposition 209." The district court ordered that the temporary restraining order apply to the defendant class.

On December 23, 1996, the district court granted the Coalition's motion for a preliminary injunction. *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996) ("*Coalition I*"). Relying on this Court's opinions in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the district court reasoned that Proposition 209 violated the Equal Protection Clause by selectively impeding political access and thus imposing a substantial political burden on the interests of women and minorities. *Coalition I*, 946 F. Supp. at 1508. The district court held that the Equal Protection Clause prohibits such treatment of race and gender issues in the political process. *Id.* at 1499. The district court also held that to the extent that Proposition 209 bans the voluntary use of race and gender preferences by public employers, Title VII preempts Proposition

209 under the Supremacy Clause. *Id.* at 1517. Accordingly, the district court restrained and enjoined the State defendants and all other members of the defendant class, pending trial or final judgment, from "implementing and enforcing Proposition 209 insofar as said amendment to the Constitution of the State of California purports to prohibit or affect affirmative action programs in public employment, public education or public contracting." *Id.* at 1520.

On January 3, 1997, the State defendants and defendant/intervenor Californians Against Discrimination and Preferences ("CADP") filed notices of appeal of the district court's order.

On April 8, 1997, the Ninth Circuit vacated the preliminary injunction. *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997) (*"Coalition II"*). The Ninth Circuit held that Proposition 209 neither violates the Equal Protection Clause, nor is preempted by Title VII. *Id.* at 1447-48.

The Coalition filed a petition for rehearing and suggestion for rehearing en banc. On August 21, 1997, the Ninth Circuit denied the petition. Four judges joined in a dissenting opinion to that decision. *Coalition for Economic Equity v. Wilson*, Nos. 97-15030 and 97-15031, 1997 WL 563160 (9th Cir. Aug. 28, 1997) (*"Coalition III"*).

On August 22, 1997, the Coalition filed in the Ninth Circuit an emergency motion seeking a stay of that Court's mandate pending a petition to this Court for a writ of certiorari. On August 25, 1997, San Francisco filed a similar motion, in which Marin joined. On August 26, 1997, the Ninth Circuit denied the motions.

On August 29, 1997, both the Coalition and San Francisco filed in this Court applications to stay the judgment of the Ninth Circuit. On September 4, 1997, this Court denied the applications.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Court should grant the Coalition's petition for a writ of certiorari. The Ninth Circuit's opinion upholding Proposition 209 cannot be reconciled with this Court's precedents. Moreover, the constitutional validity of Proposition 209 is an issue of great importance to those citizens who are burdened by a history of discrimination in California. If Proposition 209 is upheld, these citizens may no longer be able to seek from local governments adequate legislative remedies for the effects of past discrimination. In addition, local governments in California need to know whether Proposition 209 can prevent local governments from enacting voluntary affirmative action programs that are constitutionally permissible.

I. On Issues Of Fundamental Constitutional Importance, The Ninth Circuit's Decision Conflicts With This Court's Precedents.

As the Coalition's petition explains in detail, the Ninth Circuit's decision "is contrary to controlling Supreme Court precedent." *Coalition III*, 1997 WL 563160, at *1 (Schroeder, J., dissenting from denial of rehearing *en banc*). The district court and four judges of the Ninth

Circuit found that when the principles this Court established in *Seattle* and *Hunter* are applied to Proposition 209, a court "has no legitimate choice but to declare [Proposition 209] unconstitutional." *Coalition III*, 1997 WL 563160, at *3 (Norris, J., respecting the denial of rehearing *en banc*).

In *Seattle* and *Hunter*, this Court "squarely held that a state violates the Constitution when it attempts to put legislative remedies which benefit minorities at a remote level of government beyond the ordinary legislative process." *Coalition III*, 1997 WL 563160, at *1 (Schroeder, J.). The fundamental principle underlying *Hunter*, later adopted in *Seattle*, is that "a provision that has the clear purpose of making it more difficult for racial . . . minorities to achieve legislation that is in their interest . . . is discriminatory on its face." *Hunter*, 393 U.S. at 395 (Harlan, J. concurring); *see Seattle*, 458 U.S. at 474. "It is the core holding of these cases that the state may not 'place special burdens on the ability of minority groups to achieve beneficial legislation . . . by lodging decisionmaking authority over the question at a new and remote level of government.' " *Coalition III*, 1997 WL 563160, at *2 (Norris, J.) (quoting *Seattle*, 458 U.S. at 483). Proposition 209 places such a burden on women and minorities.[4]

Recently, in evaluating another constitutional amendment that placed "special burdens" on a particular group of a state's citizens, this Court stated:

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[4] Indeed, the Ninth Circuit accepted "without questioning the district court's findings that Proposition 209 burdens members of insular minorities." *Coalition II*, 110 F.3d at 1442.

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

Romer v. Evans, ___ U.S. ___, 116 S. Ct. 1620, 1628 (1996).

Proposition 209 clearly is intended to close the doors of local governments to certain groups of citizens – minorities and women – who seek local governments' assistance, while keeping the doors open to all other groups who seek similar forms of governmental assistance. *See Coalition III*, 1997 WL 563160, at *3 (Norris, J.). Because the Ninth Circuit's decision departs from the fundamental principles articulated in *Hunter, Seattle* and *Romer*, and because the consequences of that decision have extraordinary constitutional significance as discussed below, this Court should grant the Coalition's petition and review the Ninth Circuit's decision.

II. As Interpreted By The Ninth Circuit, Proposition 209 Will Cause Substantial Harm To The Victims Of Past Discrimination.

Although our nation is "dedicat[ed] to eradicating racial discrimination," *Wygant*, 476 U.S. at 280, we have not yet succeeded in eliminating the burden created by a long history of discrimination, a burden under which many minorities and women continue to labor. *See, e.g.*,

Adarand, 515 U.S. at 237 (public contracting); *United States v. Paradise*, 480 U.S. 149, 154-66 (1987) (public employment); *United States v. Fordice*, 505 U.S. 717, 721-27 (1992) (public education); *see also Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 610-11 (1990) (O'Connor, J., dissenting), *overruled in part by Adarand*, 515 U.S. at 227 (competition for public licenses). This Court has made clear that local governments have a role to play in eliminating this burden. Local governments have "compelling interest[s]" in eradicating the effects of discrimination for which the governments themselves are responsible, *see Croson*, 488 U.S. at 518 (Kennedy, J., concurring), and ensuring "that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Id.* at 492.

Many local governments have sought to fulfill this mandate by adopting narrowly tailored affirmative action programs designed to remedy the effects of past discrimination. Because *Croson* limits a government to remedying the effects of discrimination found "within *its own* legislative jurisdiction," and requires an extensive fact gathering process culminating in the adoption of a narrowly tailored remedy, the practical effect of the decision is that *only* local governments will be able to remedy local discrimination. *See id.* at 491-92, 509-10; *see also id.* at 504 (" '[I]t is essential that state and local agencies also establish the presence of discrimination in their own bailiwicks, based either upon their own fact-finding processes or upon determinations made by other competent institutions' ") (quoting, Days, *Fullilove*, 96 Yale L.J.

453, 480-81 (1987)). Inherent in the logic behind *Croson* is the recognition that typically, local governments are in the best position to identify and to implement remedies for local discrimination. *See Missouri v. Jenkins*, 495 U.S. 33, 52 (1990) ("local authorities have 'the primary responsibility for elucidating, assessing, and solving' the problems of desegregation") (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955)).

To eliminate the vestiges of discrimination and create true equal opportunity, local governments need the flexibility to enact programs targeted at unique local problems. To ensure the success of their programs, local governments often need to devote years of concerted and sustained effort. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 471-85 (1992); *Fordice*, 505 U.S. at 721-27; *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 437-38 (1968). If Proposition 209 can mandate that local governments abandon these efforts long before they have achieved their objective, those citizens who have been deprived of the ability to compete on an equal footing for opportunities in public education, employment and contracting will likely be relegated to permanent second-class status.

In sum, local affirmative action programs exist to serve local governments' compelling interests in both remedying the effects of past governmental discrimination and ensuring that government does not finance private discrimination. *See Paradise*, 480 U.S. at 167; *Croson*, 488 U.S. at 492. Under *Croson*, such local programs often are the only means by which victims of local discrimination can obtain effective relief. To the extent Proposition

209 stands in the way of these local remedies, it skews the political process to impose "substantial and unique burdens" on minorities and women. *Seattle*, 458 U.S. at 470. Because of the importance of these issues to our society in general, and to victims of discrimination in particular, this Court should grant the Coalition's petition and review the Ninth Circuit's decision.

III. As Interpreted By The Ninth Circuit, Proposition 209 Places Local Governments In A Dilemma Of Substantial Constitutional Significance.

Proposition 209 not only stands to inflict substantial harm on victims of past discriminatory practices, Proposition 209 also imposes significant harm on local governments by intensifying the dilemma identified by this Court over a decade ago:

> [P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to non-minorities if affirmative action *is* taken.

Wygant, 476 U.S. at 291 (O'Connor, J., concurring) (emphasis in original); *see also, Croson*, 488 U.S. at 519 (Kennedy, J., concurring) ("it diminishes the constitutional responsibilities of the political branches to say they must wait to act until ordered to do so by a court").

If local entities continue to administer constitutionally permissible affirmative action programs, they risk being sued by those who believe that Proposition 209 prohibits such programs. Such litigation already has been threatened in San Francisco. *See* Emblidge Declaration at

¶3 (filed in district court), attached as Exhibit C to Delventhal Declaration (filed in Ninth Circuit). And, the threat already has been realized in the City of San Jose. *See High Voltage Wire Works, Inc. v. City of San Jose*, No. CV768694 (Santa Clara Sup. Ct. filed Sept. 9, 1997).

On the other hand, if local entities dismantle affirmative action programs, they risk being sued by those who believe that such programs are required to remedy the effects of past discrimination. After all, the federal constitution does *not permit* a local government to enact a race-conscious remedial program unless that government can show that the program is a narrowly tailored remedy for past discrimination, and unless the program is based on compelling evidence of such discrimination. *Croson*, 488 U.S. at 509. Indeed, even where a local government presents overwhelming evidence of past discrimination, a race-based remedy will not withstand constitutional scrutiny if effective race-neutral alternatives exist. *See id.* at 507. If a legislative body fails to act after compiling a record sufficient to justify race-conscious remedies, the victims of the discrimination surely will travel from the statehouse to the courthouse and present the same body of evidence. Again the potential for such litigation is great. Despite having enacted the MWBE Ordinance, San Francisco has been sued for not doing *enough* to assist minority businesses. *See African American Contractors of San Francisco v. City and County of San Francisco*, No. C93-0637 (N.D. Cal. filed Feb. 22, 1991). And, of course, the day after Proposition 209 passed, the Coalition brought this action to prevent San Francisco from halting implementation of the Ordinance.

Moreover, the Ninth Circuit suggests, albeit in dicta, that under *no* circumstances does a public entity have a constitutional duty to engage in race-conscious affirmative action. *See, e.g., Coalition II,* 110 F.3d at 1446. This suggestion heightens the dilemma identified above. If a local government is confronted with compelling evidence of a history of discrimination, this Court has stated that the local government has a *duty* to act.

In *Wygant,* this Court acknowledged the existence of a constitutional duty to eliminate discrimination in the public employment context, stating: "We have recognized . . . that in order to remedy the effects of prior discrimination, it may be necessary to take race into account." 476 U.S. at 280; *see also id.* at 277 (government has a "constitutional dut[y]" to " 'do away with all governmentally imposed discriminations based on race' ") (quoting *Palmore v. Sidoti,* 466 U.S. 429, 432 (1984)); *id.* at 291 (O'Connor, J., concurring) (states have a "constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination") (emphasis in original).

Three years later, in *Croson,* this Court recognized in the context of affirmative action in government contracting, that the Equal Protection Clause may at times require race-conscious remedial measures. This Court stated that it was "clear" that a "state or local subdivision . . . has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction." 488 U.S. at 491-92. The Court found that in certain cases, "some form of narrowly tailored racial preference might be *necessary* to break down patterns of deliberate exclusion." *Id.* at 509.

In his concurring opinion, Justice Kennedy was more specific, stating:

> For purposes of the ordinance challenged here, it suffices to say that the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the *absolute duty* to do so where those wrongs were caused intentionally by the State itself.

Id. at 518 (Kennedy, J., concurring).

In addition, this Court consistently has imposed on governments an affirmative *duty* to desegregate schools. Since *Brown v. Board of Education,* this Court has required school districts to effect "the transition to a system of public education freed of racial discrimination." 349 U.S. at 299. In *Green v. County School Board of New Kent County,* this Court held that the constitution imposes on school districts "the *affirmative duty* to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. at 437-38. In *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15 (1971), this Court found that judicial authority may be invoked when school authorities fail in their "affirmative obligations" to eliminate discrimination. More recently, in *Freeman v. Pitts,* this Court stated: "The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system." 503 U.S. at 485. And, in *United States v. Fordice,* this Court made clear that this duty also exists in the context of once-segregated colleges and universities. 505 U.S. at 729.

The fact that local governments have a duty in certain circumstances to enact race-conscious remedial programs highlights the constitutional flaws in Proposition 209. Local governments need this Court's guidance on the fundamental constitutional question of when, in light of the Ninth Circuit's decision upholding Proposition 209, local governments have the power to enact and to implement voluntary affirmative action programs that are constitutionally permissible.

CONCLUSION

San Francisco, Marin and Pasadena urge this Court to grant the Coalition's petition for a writ of certiorari.

DATED: September 18, 1997

Respectfully submitted,

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APPENDIX A

SAN FRANCISCO ADMINISTRATIVE CODE CHAPTER 12D

MINORITY/WOMEN/LOCAL BUSINESS UTILIZATION

Sec. 12D.1.	Short Title.
Sec. 12D.2.	General Findings.
Sec. 12D.2-1.	Additional Findings.
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Sec. 12D.6.	Powers and Duties of the Commission and the Director.
Sec. 12D.7.	Powers and Duties of the Controller.
Sec. 12D.8.	Powers and Duties of the Mayor, Departments or Contract Awarding Authorities.
Sec. 12D.9.	Additional Findings Supporting Race- and Gender-Conscious Bid Preferences and Subcontractor Participation Goals – Public Works/Construction: Subcontracting Program.
Sec. 12D.10.	Additional Findings Supporting Race- and Gender-Conscious Bid Preferences – Purchasing Contracts.
Sec. 12D.11.	Additional Findings supporting the Race- and Gender-Conscious Bid Preferences – Consultants and Professional Services.
Sec. 12D.12.	Good-Faith Efforts Required for Other Contracts.
Sec. 12D.13.	Exceptions and Waivers.
Sec. 12D.14.	Monitoring and Compliance.
Sec. 12D.15.	Reporting and Review; Extension.
Sec. 12D.16.	Clerk of Board to Transmit Copies of this Chapter: Informing City Employees.
Sec. 12D.17.	Implementing Regulations.
Sec. 12D.18.	Severability.
Sec. 12D.19.	Effective Date.

SEC. 12 D.1. SHORT TITLE. This ordinance shall be entitled the "Minority/Women/Local Business Utilization Ordinance" and may be cited as the "MBE/WBE/LBE Ordinance – III." (Added by Ord. 175-89, App. 5/30/89; amended by Ord. 155-92, 5/29/92)

SEC. 12D.2. GENERAL FINDINGS. The Board of Supervisors having adopted Ordinance No. 139-84 on April 2, 1984 to address identified discriminatory practices inherent in the City's procurement process which resulted in the virtual exclusion of minority and woman owned businesses as contractors on City prime contracts and to offset economic disadvantages faced by local businesses that are not shared by nonlocal businesses;

And Ordinance No. 139-84 being remedial in nature will expire June 30, 1989 and thus required the Human Rights Commission to study minority and woman owned business participation in City contracting prior to the expiration of that Ordinance;

And the Human Rights Commission, pursuant to Section 12D.15 of Ordinance No. 139-84 having in June and July of 1988 heard the testimony of 42 witnesses, reviewed the transcript and written submittals of 127 minority, women, local and other business representatives, studied the testimonial and statistical evidence presented by the public, City departments, and the Commission's staff to ascertain whether the objectives of Ordinance No. 139-84 had been met and having submitted its October 23, 1988 report to this Board entitled "Investigation into Minority and Women Business Participation in City Contracting, Comprehensive Edition: Findings, Recommendations and Support Documentation";

And the United States Supreme Court on January 23, 1989 having decided **City of Richmond v. Croson** which addresses the constitutionally acceptable quantum of evidence that enables a municipality to adopt a race-conscious remedial ordinance in public contracting;

And the Budget Analyst at the request of this Board having studied the participation of minority and women owned businesses in City contracts at the prime contractor level during fiscal year 1987-1988 and compared this business participation to minority and women businesses' share of their relevant respective industries or professions and having submitted his report dated March 8, 1989 and his revised report dated March 17, 1989 to this Board;

And BPA Economics, Inc. at the request of the City Attorney and the Director of the Human Rights Commission having evaluated statistical evidence provided by City departments and the Budget Analyst, conducted a statistical analysis of these data and having submitted its report entitled "Statistical Support for San Francisco's MBE/WBE/LBE Ordinance," dated May 1, 1989 and his revised report dated May 15, 1989, to this Board;

And this Board, having conducted 10 additional public hearings, taken additional testimony and written submittals, and reviewed the 1983 and 1988 reports of the Human Rights Commission, the 1989 reports of the Budget Analyst, and the 1989 report of BPA Economics, Inc. (all of which shall be incorporated herein by reference) and relying upon this Board's knowledge about the City's compliance with Ordinance No. 139-84, such knowledge having been acquired during the past five years,

This Board hereby makes the following findings:

1. Local businesses that seek to enter into contracts with the City and County of San Francisco continue to labor under a competitive disadvantage with businesses from other areas because of the higher administrative costs of doing business in the City (e.g. higher taxes, higher rents, higher wages and benefits for labor, higher insurance rates, etc.). In 1991, this Board concluded that MBEs and WBEs are currently receiving a very small share of City contracts through joint ventures with majority-owned firms, while a number of well-established LBEs have taken advantage of the five-percent LBE bid preference by joint venturing with each other. The Board concludes that the five-percent MBE/WBE bid preference has not proved sufficiently effective in remedying the exclusion of MBEs and WBEs from City contracts through the vehicle of joint ventures. Accordingly, the Board is granting a seven and one-half percent bid preference to joint ventures with MBE or WBE participation between 40 percent and 50.9 percent to provide more incentives for majority firms to joint venture with MBEs and WBEs to provide services to the City.

2. The public interest is served by continuing to encourage business to locate and remain in San Francisco through the provision of a minimal "good-faith" preference to local businesses in the award of City contracts.

3. Policies and programs that enhance the opportunities and entrepreneurial skills of minority owned, woman owned, and local businesses will best serve the public interest because the growth and development of such businesses will have a significant positive impact on

the economic health of the City and will serve to reduce racial tension in our community.

4. The testimony of businesses that seek to enter into contracts with the City or are doing business with the City, as presented to this Board and as detailed in the Human Rights Commission's 1988 report, offer clear and persuasive reasons for the Board of Supervisors to take the actions proposed by this Ordinance to remedy: (1) City contracting practices and community conditions that cause the exclusion or reduce the opportunities of minority and woman owned businesses to be awarded City contracts to such an extent that the amount of City contract dollars awarded to them can only be explained by discrimination; and (2) competitive disadvantages local business continue to face in providing goods and services to the City.

5. Outreach and advertising efforts by City departments have served to draw more minority and woman business enterprises into the City's procurement process. The City needs to intensify its outreach and advertising efforts as well as its education/training programs to reach a broader segment of the MBE/WBE community. However, past experience has taught that outreach and advertising efforts alone are not enough to remedy the exclusion of minority and women owned businesses as prime contractors with the City.

6. Ordinance No. 139-84 has provided City departments with uniform standards and criteria in the award of contracts. However, these standards have not been applied consistently City-wide. This inconsistent application of the Ordinance continues to give preference to

majority businesses in the prime award process to the detriment of minority and women business enterprises.

7. The bid preference mechanism has the advantage of affording minority, woman and local business enterprises a competitive "plus" when bidding or proposing on City contracts. The bid preference mechanism does not exclude any potential contractor. It encourages competition and thereby ensures that the City is contracting with responsible, efficient contractors. Consequently, the bid preference mechanism has assisted minority, woman and local business enterprises to obtain City contracts. The bid preference is allowed to joint ventures where MBEs and WBEs participate at a managerial and entrepreneurial level with nonminority and nonwoman entrepreneurs. Affording the bid preference to joint ventures has encouraged nonMBE/WBEs to enter into joint venture agreements with MBE/WBEs and compete for City contracts. Several joint ventures of minority/woman and majority/male owned firms have won large construction and professional services contracts with the assistance of the bid preference. The evidence in the record before this Board supports the conclusion that the bid preference invites participation by formerly excluded businesses and hence promotes more competition, resulting in more competitive bids submitted to the City.

8. In Ordinance No. 175-89 this Board concluded that set-asides of contracts, where competition for selected contracts is limited to MBE/WBEs or joint ventures with MBE/WBEs, had been authorized by the Director of the Human Rights Commission only on rare occasions over the past five years (1984-1985). Before the adoption of Ordinance No. 175-89, the Director had

regarded the contract set-aside mechanism as a measure to be used in last-resort type cases where a department could demonstrate, despite its good-faith efforts and the application of the bid preference, that it had failed substantially to eliminate the exclusion of MBEs and WBEs from City contracting. In 1989, at the time Ordinance No. 175-89 was adopted, this Board concluded that despite the claim by several departments that the contract set-aside mechanism was essential to ensure participation by MBE/WBEs, the City had made steady progress City-wide toward the MBE/WBE goals while only making sparing use of the contract set-aside mechanism. However, in 1991, this board found that the use of good-faith efforts and the application of the bid preference did not appear in all cases to be a sufficient remedy for opening the closed environment in which City departments operate or correcting the identified discriminatory practices of the City against MBEs and WBEs. The Board reaffirms its 1991 finding that setting aside contracts limited to competition among MBE/WBEs or joint ventures with MBE/WBEs is a necessary remedy in those limited cases where a department can demonstrate, despite its good-faith efforts and the application of the bid preference, that it has failed substantially to eliminate the exclusion of MBEs and WBEs from City contracting.

9. Without the Ordinance, many small MBE/WBEs would be unable to compete for and win awards of prime City contracts.

10. Some City departments continue to operate under the "old boy network" when awarding contracts. The City's "old boy network" constitutes a closed business system created and implemented by the City for all

contracts, including those subject to the competitive bid process. Discrimination against and insensitivity to MBEs and WBEs continue to persist in the City's procurement process. The closed environment in which City businesses operate has excluded MBEs and WBEs and has placed them under a competitive disadvantage when competing for City prime contracts.

11. The statistical evidence before this Board relating to the award of contracts subject to this Ordinance for fiscal year 1987-1988 reflects that in almost all areas of contracting MBEs (each ethnic group identified as a minority) and WBEs continue to be awarded contract dollars that are disproportionately lower than the available numbers of MBEs and WBEs in San Francisco. These data are gathered and summarized in Appendix X, which contains utilization indices described as Tables 1 through 7, and 10 through 11, and is attached to this Ordinance and incorporated herein by reference as though fully set forth. These utilization indices measure the disparity between MBEs (as a group and each ethnic group identified as a minority) or WBE participation in City prime contracts and their share of their relevant industry or profession. That disparity is measured in terms of a statistical significance. When measure of the statistical significance is minus two (-2) or less, the board concludes that the disparity cannot be attributed to chance. Based upon the weight of the testimony and other evidence before this Board and the Commission in 1983, 1984, 1988 and 1989, the Board finds that the statistical disparities can only be attributed to discriminatory procurement practices of the City against MBEs and WBEs.

Based on the testimony and other evidence before this Board and the Commission in 1983, 1984, 1988 and 1989, the Board finds that the aforementioned statistical disparities are also attributed to discrimination in the private sector against MBEs and WBEs that is manifested in and perpetuated and exacerbated by the City's procurement practices.

12. Consistent with Ordinance No. 139-84, on December 19, 1988 the Board of Supervisors adopted legislation which requires the City's Risk Manager to develop uniform insurance requirements for City contracts. On May 2, 1989 the Risk Manager established these uniform standards which are set forth in a document entitled "Contract Insurance Manual." This manual is intended to be a guide for contract administrators to standardize bond and insurance requirements in City contracts.

13. Consistent with Ordinance No. 139-84, the Board of Supervisors has also considered whether to: (1) create a special revolving fund to assist newly established MBEs and WBEs to meet bonding and other fee-related requirements; and (2) relax or waive bonding requirements on certain contracts to facilitate MBE/WBE participation. In view of the City's budgetary constraints and the opposition voiced by segments of the local business community, this Board finds that creation of a special revolving fund, or relaxation or waiver of bonding requirements is not feasible at this time. (Added by Ord. 175-89, App. 5/30/89; amended by Ord. 155-92, 5/29/92)

SEC. 12D.2-1. ADDITIONAL FINDINGS. Upon the expiration of Ordinance No. 139-84 this Board having

adopted Ordinance No. 175-89 on May 30, 1989 to address the same types of practices and to offset the same types of economic disadvantages identified in Section 12D.2;

And Ordinance No. 175-89 as amended being remedial in nature will expire June 30, 1992 and thus required the Human Rights Commission to study minority and woman owned business participation in City contracting prior to the expiration of Ordinance 175-89;

And the Human Rights Commission, pursuant to Section 12D.15 of Ordinance No. 175-89 having in January and February of 1992 hear the testimony of 68 witnesses, reviewed the transcripts and written submittals of 54 minority, women, local and other business representatives, studied the testimonial and statistical evidence presented by the public, City departments, and the Commission's staff to ascertain whether the objectives of Ordinance No. 175-89 as amended had been met and having submitted to this Board its February 28, 1992, "Sunset Report" and its March 2, 1992 "Progress Report FY 1990-91";

And this Board, having conducted additional public hearings, taken additional testimony and written submittals, and reviewed the Human Rights Commission's February 28, 1992 "Sunset Report" and its March 2, 1992 "Progress Report FY 1990-91" (all of which shall be incorporated by reference);

And this Board incorporating by reference the findings set forth in Section 12D.2 above;

And relying upon this Board's knowledge acquired during the past eight years about the City's compliance with the MBE/WBE/LBE Ordinances and all amendments thereto. This Board hereby finds that the purposes of the MBE/WBE/LBE Ordinances and the amendments thereto have not been fulfilled and that it is necessary to extend Ordinance No. 175-89 as amended for an additional five-year period. (Added by Ord. 155-92, App. 5/29/92)

SEC. 12D.3. DECLARATION OF POLICY. It is the policy of the City and County of San Francisco to ensure full and equitable opportunities for Minority Business Enterprises, Woman Business Enterprises, and local businesses to participate as prime contractors in the provision of goods and services to the City. This program is intended to correct identified discriminatory practices inherent in the City's procurement process and in the award of prime contracts to MBE/WBEs and to develop their status and capability as prime contractors of the City. Another goal of this Ordinance is to offset some of the economic disadvantages local businesses continue to face that are not shared by nonlocal businesses.

The City will continue to rely on the relationship between the percentages of minority (each ethnic group identified as a minority) and women owned businesses in the relevant sector of the San Francisco business community and their respective shares of City contract dollars as a measure of the effectiveness of this Ordinance in remedying the effects of the aforementioned discrimination.

The City is continuing to use a preference for local business in the award of City contracts in order to

encourage business to locate and remain in San Francisco and thereby enhance employment opportunities for persons living in San Francisco. The cost of locating and doing business in San Francisco continues to be as much as 15 percent and greater than the cost of doing business in the surrounding communities; affording a five-percent bid preference for local businesses bidding on City contracts reduces the disadvantages under which City-located businesses labor when competing for City contracts, affording them a five-percent bid preference makes good sense. In effect the bid preference assists these businesses in contributing to the economic health of the City. The five-percent bid preference does not unduly hamper non-local businesses in the contracting process, and parallels the preferences awarded in many other local jurisdictions. (Added by Ord. 175-89, App. 5/30/89)

SEC. 12D.4. SCOPE. The race- and gender-conscious bid preferences of this Ordinance shall be afforded only to economically disadvantaged minority and women owned businesses in all specifically enumerated categories of City contracts for the procurement of goods and services subject to exemptions hereinafter specifically enumerated. The local business bid preference shall be afforded to all local businesses in the award of all City contracts for the procurement of goods and services subject to exceptions hereinafter specifically enumerated in Section 12D.13. (Added by Ord. 175-89, App. 5/30/89)

SEC. 12D.5. DEFINITIONS. "Annual participation goals" shall mean the targeted levels of City-wide MBE/WBE participation in City prime contracts that reflect the relevant share of MBEs or WBEs in a given industry or profession referred to as "percent availability" in the

utilization indices contained in Appendix X to this Ordinance.

"Award of a contract" occurs when a contract is certified by the Controller of the City and County of San Francisco.

"Back contracting" shall mean any agreement or other arrangement between a prime contractor and its subcontractor where the prime contractor performs or secures the performance of the subcontract in such a fashion and/or under such terms and conditions that the prime contractor enjoys the financial benefits of the subcontract. Said agreement or other arrangement includes, but is not limited to, situations where either a contractor or subcontractor agrees that any term, condition or obligation imposed upon the subcontractor by the subcontract shall be performed by or be the responsibility of the prime contractor.

"Bid" shall mean and include a quotation, proposal, solicitation or offer by a bidder or contractor to perform or provide labor, materials, equipment, supplies or services to the City and County of San Francisco for a price.

"Bidder" shall mean any business that submits a quotation, bid or proposal to provide labor, materials, equipment, supplies or services to the City and County of San Francisco.

"City" shall mean the City and County of San Francisco.

"Commercially useful function" for purposes of determining whether a business is a Minority Business Enterprise, Woman Business Enterprise or Local Business

Enterprise shall mean that the business is directly responsible for providing the materials, equipment, supplies or services to the City as required by the solicitation or request for quotes, bids or proposals MBEs, WBEs or LBEs who engaged in the business of providing brokerage, referral or temporary employment services shall not be deemed to perform a "commercially useful function" unless the brokerage, referral or temporary employment services are those required and sought by the department.

"Commission" shall mean the Human Rights Commission of the City and County of San Francisco.

"Concession" shall include any grant of land or other property by or on behalf of the City and County of San Francisco to a person for the purpose or use specified in said grant. A "concession" shall not include an agreement to perform construction-related services.

"Contract" shall mean and include any agreement between the City and a person to provide or procure labor, materials, equipment, supplies or services to, for or on behalf of the City and County of San Francisco. A "contract" shall include an agreement between the City and a person or nonprofit entity to perform construction-related services or fund the performance of such services. Except as otherwise specifically defined in this section, a "contract" does not include: (1) awards made by the City with Federal/State grant or City general fund monies to a nonprofit entity where the City offers assistance, guidance, or supervision on a project or program and the recipient of the grant award uses the grant monies to provide services to the community; (2) sales transactions

where the City sells its personal or real property; (3) a loan transaction where the City is acting as a debtor or a creditor; (4) lease, franchise, or concession agreements; (5) agreements to use City real property; or (6) gifts of materials, equipment, supplies or services to the City.

"Contract awarding authority" shall mean the City officer, department, commission, employee or board authorized to enter into contracts on behalf of the City. In the case of an agreement with a person or nonprofit entity to perform or fund the performance of construction-related services, the term "contract awarding authority" shall mean the person or nonprofit entity receiving funds from the City to perform or fund the performance of such services.

"Contractor" shall mean any person(s), firm, partnership, corporation, or combination thereof, who submits a bid to perform, performs any part of, agrees with a person to provide services relating to and/or enters into a contract with department heads and officers or contract awarding authorities empowered by law to enter into contracts on the part of the City for public works or improvements to be performed, or for goods or services or supplies to be purchased at the expense of the City or to be paid out of monies deposited in the treasury or out of trust monies under the control of or collected by the City.

"Controlled" for the purposes of determining whether a business is a Minority Business Enterprise, or Woman Business Enterprise, shall mean the minority(ies), the woman or combination of minorities and women, as the context requires, shall (1) possess legal authority and

power to manage business assets, good will and daily operations of the business; and (2) actively and continuously exercise such authority and power in determining the policies and directing the operations of the business.

"Director" shall mean the Director of the Human Rights Commission of San Francisco.

"Economically disadvantaged business" shall mean a business whose average gross annual receipts in the three fiscal years immediately preceding its application for certification as a MBE, WBE or LBE do not exceed the following limits: (1) Public works/construction – $14,000,000; (2) Goods/materials/equipment and general services suppliers – $2,000,000; (3) Professional services – $2,000,000.

"Equipment and supplies contract" shall mean term purchase agreements, contract orders, purchase orders and any other agreement for the purchase of transportation equipment, office supplies, data processing and office equipment, hospital and medical equipment and supplies, food, building supplies, fire/safety equipment and supplies, clothing, miscellaneous and electrical equipment and supplies. The term "equipment and supplies contract" shall not include contracts for fuels, lubricants and illuminants.

"Franchise" shall mean and include the right or privilege conferred by grant from the City and County of San Francisco, or any contracting agency thereof, and vested in and authorizing a person to conduct such business or engage in such activity as is specified in the grant. A "franchise" shall not include an agreement to perform construction-related services.

"General services contract" shall mean term purchase agreements, contract orders, purchase orders and any other agreement for the procurement of janitorial, security, equipment and computer maintenance, miscellaneous, printing and graphics services.

"Good-faith efforts" when required of a contract awarding authority or department shall mean the actions undertaken by a department to obtain MBE or WBE participation in a contract as prime contractors, and shall include the following efforts: (1) encouraging MBE/WBEs to attend pre-bid meetings, scheduled by a department or the Commission, to inform potential contractors of contracting opportunities; (2) advertising in general circulation media, trade association publications and minority/woman business focus media; (3) notifying MBE/WBEs who are available to perform the work contemplated in a contract, soliciting their interest in the contract; (4) dividing the contract work into economically feasible units to facilitate MBE/WBE participation in the contract; (5) pursuing solicitations of interest by contacting MBE/WBEs to determine whether these businesses are interested in participating on the contract; (6) providing MBE/WBEs with adequate information about the plan, specifications and requirements of the contract; (7) where applicable, negotiating with MBE/WBEs in good faith and demonstrating that MBE/WBEs were not rejected as unqualified without sound reasons based on a thorough investigation of their capabilities; and (8) using the services of available community and contractors' groups, local, State or Federal minority and woman business assistance offices that provide assistance in the recruitment of MBE/WBEs for public sector contracts.

"Good-faith efforts" when required of a prime public works/construction contractor or professional services provider shall mean the steps undertaken to comply with the goals and requirements imposed by the City for participation by minority and women business enterprises as subcontractors, and shall include the following:

(1) Attending any presolicitation or prebid meetings scheduled by the City to inform all bidders of the minority and women business enterprise program requirements for the project for which the contract will be awarded;

(2) Identifying and selecting specific items of the project for which the contract will be awarded to be performed by minority or women business enterprises to provide an opportunity for participation by those enterprises;

(3) Advertising, not less than 10 calendar days before the date the bids are opened, in one or more daily or weekly newspapers, trade association publications, minority or trade-oriented publications; trade journals, or other media, specified by the City for minority or women business enterprises that are interested in participating in the project. This paragraph applies only if the City gave public notice of the project not less than 15 calendar days prior to the date the bids are opened;

(4) Providing written notice of his or her interest in bidding on the contract to the number of minority or women business enterprises required to be notified by the project specifications not less than 10 calendar days prior to the opening of bids. The City shall make available to the bidder not less than 15 calendar days prior to the date the bids are opened a list or a source of lists of

enterprises which are certified by the Director as minority or women business enterprises;

(5) Following up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested in performing specific items of the project;

(6) Providing interested minority and women business enterprises with information about the plans, specifications, and requirements for the selected subcontracting or material supply work;

(7) Requesting assistance from minority and women community organizations; minority and women contractor or professional groups; local, State or Federal minority and women business assistance offices; or other organizations that provide assistance in the recruitment and placement of minority or women business enterprises, if any are available;

(8) Negotiating in good faith with the minority or women business enterprises, and not unjustifiably rejecting as unsatisfactory bids or proposals prepared by any minority or women business enterprises, as determined by the City;

(9) Where applicable, advising and making efforts to assist interested minority and women business enterprises in obtaining bonds, lines of credit, or insurance required by the City or contractor;

(10) Making efforts to obtain minority and women business enterprise participation that the City could reasonably expect would produce a level of participation sufficient to meet the City's goals and requirements.

"Human Rights Commission (HRC)" shall mean the Human Rights Commission of San Francisco, consisting of Commissioners appointed by the Mayor; hereinafter, it shall be referred to as the "Commission."

"Joint venture" shall mean and may be referred to as an "Association" of two or more businesses acting as a contractor and performing or providing services on a contract, in which each joint venture or association partner combines property, capital, efforts, skill, and/or knowledge.

"Lease" shall mean and include an agreement by which the City and County of San Francisco or any contracting agency thereof, grants to a person the temporary possession and use of property for reward, and the latter agrees to return the same to the former at a future time. A "lease" shall not include an agreement to perform construction-related services.

"Local business" or "Local business enterprise (LBE)" shall mean an economically disadvantaged business which is an independent and continuing business for profit, performs a commercially useful function and is a firm:

(1) With fixed offices or distribution points located within the geographical boundaries of the City and County of San Francisco;

(2) Listed in the Permits and License Tax Paid File with a San Francisco business street address; and

(3) Which possesses a current Business Tax Registration Certificate at the time of the application for certification as a local business. Post Office box numbers or

residential addresses shall not suffice to establish status as a "local business." To qualify as a "local business" or "LBE" a business must establish that it has been located and doing business in San Francisco for at least six months preceding its application for certification as a local business.

"Lower-tier subcontracting" shall mean any agreement or other arrangement between a subcontractor and a person as defined herein where it is agreed that said person shall perform any term, condition or obligation imposed by the subcontract upon the subcontractor.

"Minority," "minorities," or "minority person" shall mean members of one of the following ethnic groups: Asians (defined as Chinese, Japanese, Koreans, Pacific Islanders, Samoans, Filipinos, Asian Indians, and Southeast Asians), Blacks, and Latinos (defined as Mexicans, Puerto Ricans, Cubans, Central or South Americans).

"Minority Business Enterprise (MBE)" shall mean an economically disadvantaged local business which is an independent and continuing business for profit, performs a commercially useful function, and is owned and controlled by one or more minority persons residing in the United States or its territories.

"Miscellaneous professional services" shall mean all professional services except legal, architect/engineer, computer systems, management consulting and medical services.

"Office" or "offices" shall mean a fixed and established place where work is carried on of a clerical, administrative, professional or production nature directly

pertinent to the business being certified. A temporary location or movable property or one that was established to oversee a project such as a construction project office does not qualify as an "office" under the Ordinance.

"Owned," for purposes of determining whether a business is a minority business enterprise or woman business enterprise, shall mean that the minorities or women as the context requires, shall possess an ownership interest of at least 51 percent of the business, and shall:

(1) Possess incidents of ownership, such as an interest in profit and loss, equal to at least the required ownership interest percentage; and

(2) Contribute capital, equipment and expertise to the business equal to at least the required ownership percentage.

Ownership of an individual seeking MBE or WBE certification shall be measured as though the applicant's ownership is not subject to the community property interest of a spouse, if both spouses certify that (a) only the woman or minority spouse participates in the management of the business and (b) the nonparticipating spouse relinquishes control over his/her community property interest in the subject business; or both spouses have bona fide management and control of the business.

"Participation commitment" shall mean the targeted level of MBE/WBE subcontractor participation that each prime public works/construction contractor or professional service provider has designated in its bid.

"Participation goals" shall mean the targeted levels of City-wide MBE/WBE participation in City prime contracts that reflect the relevant share of MBEs or WBEs in a given industry or profession referred to as "percent availability" in the utilization indices contained in Appendix X to this Ordinance.

"Percent availability"; see "Participation goals."

"Person" includes one or more individuals, partnerships, associations, organizations, trade or professional associations, corporations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers, or any group of persons, including any official, agent or employee of the City and County of San Francisco.

"Professional services contract" shall mean agreements for the procurement of legal, architect/engineer, computer systems, management consulting, medical services and miscellaneous professional services.

"Public works/construction contract" shall mean agreements for the construction, reconstruction or repair of public buildings, streets, utilities or other public works or improvements.

"Set aside" when referring to a contract or project shall mean a procurement or contract award process where competition for a contract or project is limited to MBEs, WBEs and/or joint ventures with MBE/WBEs.

"Subcontractor" shall mean any business providing goods or services to a contractor for profit, if such goods or services are procured or used in fulfillment of the contractor's obligations arising from a contract with the City and County of San Francisco.

"Subcontractor participation goals" shall mean the targeted level of MBE/WBE subcontractor participation designated by the Director for prime public works/construction and professional services contracts.

"Woman Business Enterprise (WBE)" shall mean an economically disadvantaged local business which is an independent and continuing business for profit, performs a commercially useful function and is owned and controlled by one or more women residing in the United States or its territories.

"Woman/Minority Man Business Enterprise (W/MBE)" shall mean an economically disadvantaged local business which meets the definition of an MBE or WBE, except that the aggregate ownership interest of the woman and the minority man equals or exceeds 51 percent of the business. An W/MBE shall qualify and be deemed by a department an MBE or WBE, but not both, for purposes of this Ordinance. Any reference in this Ordinance to MBE or WBE includes a W/MBE. (Added by Ord. 175-89, App. 5/30/89; amended by Ord. 190-91, App. 5/31/91; Ord. 283-91, App. 6/12/91; Ord. 76-92, App. 3/13/92; Ord. 155-92, App. 5/29/92; Ord. 284-92, App. 9/16/92)

SEC. 12D.6. POWERS AND DUTIES OF THE COMMISSION AND THE DIRECTOR. (A) In addition to the duties and powers given to the Human Rights Commission elsewhere, the Commission shall:

1. Collect and analyze relevant data which will assist the Board of Supervisors in determining whether race-or gender-conscious remedies are appropriate and necessary for contracts not subject to or ethnic groups not

afforded the race- and gender-conscious bid preferences of this ordinance. The Commission shall periodically report the results of this study to this Board;

2. Levy sanctions as specified in Section 12D.8(B)(7);

3. When necessary, subpoena persons and records, books and documents for a proceeding of the Commission or an investigation by the Director conducted to further the purposes of this ordinance;

4. Amend existing rules and regulations establishing standards and procedures for effectively carrying out this ordinance. The rules and regulations shall provide for administrative procedures which will allow a business to prove and the Commission to recommend to this Board that the ordinance's remedial measures should not be applied to an industry or profession because MBE/WBE participation in City prime contracts has reached parity with their numbers in the relevant business community and MBE/WBEs no longer suffer from a discrimination-induced competitive disadvantage in the applicable industry or profession. The regulations shall also provide a mechanism for contractors to seek a determination by the Director that a MBE or WBE may not be granted a race- or gender-conscious bid preference where it is demonstrated that the MBE or WBE's bid price is not attributable to the effects of past discrimination.

(B) In addition to the duties and powers given to the Director elsewhere, the Director shall have the following duties and powers:

1. Through appropriately promulgated procedures, certify businesses as bona fide MBEs/WBEs/LBEs. These procedures shall provide that any business seeking certification as a local business shall meet the definition of a LBE and possess or establish all of the following: (1) business cards for the San Francisco office; (2) business stationery for the San Francisco office; (3) written agreement for occupancy of the San Francisco office; (4) that the business is listed in an appropriate business buyers guide such as a telephone yellow pages listing San Francisco based businesses; (5) that business is transacted in the San Francisco office; (6) a conspicuously displayed business sign at the San Francisco business premises except where the business operates out of a residence; and (7) the office is appropriately equipped for the type of business for which certification as a LBE is sought.

Except where the Director cannot certify a business because the business has not been established in San Francisco for the requisite six months, whenever the Director denies an application for or revokes the certification of a business as a MBE, WBE, LBE because the business is not a bona fide MBE, WBE, LBE, the Director shall inform the aggrieved business in writing when the business will be eligible to reapply for certification. The Director shall require a business to wait at least six months but not more than two years after the denial or revocation before reapplying to the Director for certification as a MBE, WBE or LBE. Except as provided in Section 12D.14(C), the Director's denial or revocation of certification of a business as a MBE, WBE, LBE shall not be appealable to the Commission;

2. Annually, and more often if he deems necessary, analyze the most recently available data on "percent availability" of MBEs and WBEs in the various industries and professions identified in the utilization indices set forth in Appendix X to this ordinance and the Human Relations Commission's 1992 Sunset Report. Applying statistically sound methods of analysis, the Director shall identify areas of contracting where the City or its departments are failing to meet the participation goals to such an extent that an inference of discrimination can be made. In addition, the Director shall identify areas of contracting where the City is meeting and/or exceeding participation goals to such an extent that the MBE or WBE bid preferences can no longer be justified. The results of this study shall be included in the Commission's annual report required by Section 12D.15(C).

Not later than March 1st of each fiscal year, the Director shall transmit to the Board of Supervisors proposed amendments to this ordinance and the utilization indices necessitated by the data he has collected and analyzed;

3. By July 1st of each fiscal year subject to this ordinance, inform the Controller of the data each department is required to provide the Controller on each contract award. This data shall form the basis of the Commission's report to the Mayor and the Board of Supervisors and the public on the participation of MBEs and WBEs on City prime contracts subject to the ordinance;

4. Provide information and other assistance to MBEs and WBEs to increase their ability to compete effectively for the award of City contracts;

5. Assist the City to increase participation by MBEs and WBEs in City contracts;

6. Continue to develop and strengthen education and training programs for MBEs and WBEs and City contract awarding personnel;

7. Where after determining that a department, despite its good-faith efforts and application of the bid preference(s), has failed substantially to eliminate the exclusion of MBEs and/or WBEs from City contracting, the Director, after consulting with the department responsible for the project(s), may request the Contract Review Committee established in Section 12D.8.(A)(3) to review and approve the proposed project(s) for a set aside;

8. Work with the Controller and representatives of City departments to implement a City-wide prompt-payment policy requiring that MBEs, WBEs and LBEs be paid by the City within 60 days of the date on which the City receives an invoice from an MBE, WBE or LBE for work performed for the City.

(C) The requirements of this ordinance are separate from those imposed by the United States or the State of California as a condition of financial assistance or otherwise; however, the Director may authorize the substitution of such State or federal Minority Business Enterprise and Women Business Enterprise requirements for the requirements of this ordinance whenever such State or

federal requirements are substantially the same as those of this ordinance.

(D) The Director, with the approval of the Commission, may enter into cooperative agreements with agencies, public and private, concerned with increasing the utilization of MBEs and WBEs in government contracting, subject to the approval of the Board of Supervisors of the City and County of San Francisco. (Added by Ord. 175-89, App. 5/30/89; amended by Ord. 190-91, App. 5/31/91; Ord. 155-92, App. 5/29/92; Ord. 278-96, App. 7/3/96)

SEC. 12D.7. POWERS AND DUTIES OF THE CONTROLLER. (A) In addition to the duties given to the Controller elsewhere, the Controller shall work cooperatively with the Director to assemble and maintain the data the Director advises are necessary to form the basis of the Commission's report to the Mayor, Board of Supervisors and the public on the participation of MBEs and WBEs in City prime contracts.

(B) The Controller shall not certify the award of any contract subject to this ordinance until the department requesting certification of the award of the contract has provided the Controller with the information the Director advises is necessary under this ordinance.

(C) It is the City's policy that MBEs, WBEs and LBEs should be paid by the City within 30 days of the date on which the City receives an invoice from an MBE, WBE or LBE for work performed for the City. The Controller shall work with the Director and representatives of City departments to implement this City-wide prompt-payment policy. (Added by Ord. 175-89, App. 5/30/89;

amended by Ord. 155-92, 5/29/92; Ord. 398-95, App. 12/22/95; Ord. 278-96, App. 7/3/96)

SEC. 12D.8. POWERS AND DUTIES OF THE MAYOR, DEPARTMENTS OR CONTRACT AWARDING AUTHORITIES. (A) In addition to the duties given to the Mayor elsewhere, the Mayor shall:

1. By July 1st of each fiscal year subject to this ordinance, issue notices to all City departments informing them of their duties under this ordinance. The notice shall contain the following information: (1) the City-wide MBE/WBE participation goals that departments are expected to use good-faith efforts to attain during the fiscal year and that a department's failure to use good-faith efforts to attain the MBE/WBE participation goals shall be reported to the Board of Supervisors in the Commission's annual report; and (2) the data each department is required to provide the Controller on each contract award;

2. Coordinate and enforce cooperation and compliance by all departments with this ordinance;

3. Establish a three-member Contract Review Committee who shall have the authority to review contracts proposed by the Director or a department to be set aside, where competition for these contracts is limited to MBEs, WBEs and/or joint ventures with MBE/WBEs. The three-member Contract Review Committee shall be composed of the HRC Director, an individual appointed by the Board of Supervisors and an individual appointed by the Mayor. The Board and the Mayor shall appoint individuals who are knowledgeable about contracting practices

of the City and of the industry or profession affected by the set-aside of the contract;

4. Establish a three-member Subcontracting Goals Committee which shall have the authority to review decisions by the Director denying a contractor's request, pursuant to Section 12D.9(D)-(4) or 12D.11(A)-(6), to waive or reduce subcontractor participation goals. The three-member Subcontracting Goals Committee shall be composed of an individual appointed by the Commission, and individual appointed by the Board of Supervisors and an individual appointed by the Mayor. The Commission, the Board of Supervisors and the Mayor shall appoint individuals who are knowledgeable about the City's contracting and subcontracting practices and the relevant construction or professional service industry. The Commission, the Board of Supervisors, or the Mayor may not appoint to the Subcontracting Goals Committee the Director or any employee of the Human Rights Commission.

(B) Contract awarding authorities or in the case of a professional services contract, the department making the contract award recommendation, shall:

1. Use good-faith efforts to solicit and obtain quotes, bids or proposals from MBEs and WBEs on all solicitations, or document their unavailability;

2. Unless otherwise indicated in this ordinance and except where prohibited by State or Federal law or regulation, extend a preference in all bids and contracts and in the composition of rating scales as follows: (1) a five-percent preference to (i) a local business or (ii) a joint venture with local MBE or local WBE participation which

equals or exceeds 35 percent but is under 40 percent; or (iii) where a joint venture is composed of only local businesses with no local MBE or WBE participation or where the local MBE or local WBE participation is less than 35 percent; (2) a seven and one-half percent (7.5%) preference to (i) a joint venture with local MBE or WBE participation which equals or exceeds 40 percent but is less than 51 percent; (3) a 10-percent preference to (i) a local MBE or local WBE or (ii) a joint venture with local MBE or local WBE participation which equals or exceeds 51 percent.

A joint venture shall receive the aforementioned appropriate bid preference when the MBE or WBE is an active partner in the joint venture and performs work, manages the job and takes financial risks in proportion to the required level of participation stated in the bid documents and is responsible for a clearly defined portion of the work to be performed, and shares in the ownership, control, management responsibilities, risks, and profits of the joint venture. The portion of the MBE or WBE joint venturer's work shall be set forth in detail separately from the work to be performed by the nonMBE or non-WBE joint venture partner. The MBE or WBE joint venturer's portion of the contract must be assigned a commercially reasonable dollar value;

3. Arrange contracting by size and type of work to be performed so as most effectively to enhance the opportunity for participation by MBEs and WBEs to the maximum extent feasible. As soon as practical before soliciting quotes, bids or proposals, all contract awarding authorities or in the case of a professional services contract, the department making the contract award recommendation,

shall submit all large proposals to the Director for review. The purpose of the Director's review is to determine whether the proposed project can be divided into smaller projects so as to enhance the opportunity for participation by MBEs and WBEs in the project. For purposes of this subsection, the term "large project" shall mean the following: (1) any public works/construction project estimated to cost more than $5,000,000; (2) any professional services contract estimated to cost more than $50,000. If the Director determines, after consulting with the contract awarding authority or department responsible for the project, that the project can be divided into smaller projects, the contract awarding authority or department shall comply with the Director's determination and issue the solicitation for quotes, bids or proposals in accordance with the Director's determination;

4. Adjust bid bonding and insurance requirements as recommended by the City Risk Manager in his May 2, 1989 "Contract Insurance Manual";

5. Utilize a revolving fund as may be established by the City to assist MBEs and WBEs to meet bonding, insurance and other fee-related requirements;

6. Submit to a central office all current bids, requests for proposals, and solicitations with sufficient lead time to provide adequate notice and opportunity to MBEs and WBEs to participate;

7. Impose such sanctions or take such other actions as are designed to ensure compliance with the provisions of this ordinance, which shall include, but are not limited to:

(a) Refusal to grant the award of a contract;

(b) Order the suspension of a contract;

(c) Order the withholding of funds;

(d) Order the revision of a contract based upon a material breach of contract provisions pertaining to MBE or WBE participation;

(e) Disqualification of a bidder, contractor, subcontractor, or other business from eligibility for providing goods or services to the City for a period not to exceed five years, with a right to review and reconsideration by the Commission after two years upon a showing of corrective action indicating violations are not likely to recur;

8. Not award any contract to a person or business which is disqualified from doing business with the City under the provisions of this ordinance, nor shall any contract be awarded to any person or business which is disqualified from doing business with any governmental agency based on failure to comply with Minority or Women Business Enterprise or contract compliance requirements which are substantially the same as those of this ordinance;

9. Designate a staff person to be responsible for responding to the Director and Commission and to the requirements of this ordinance;

10. Maintain accurate records for each contract awarded, its dollar value, the nature of the goods or services to be provided, the name of the contractor awarded the contract, the efforts made by a construction,

architect/engineer contractor to solicit bids from and award subcontracts to MBEs and WBEs;

11. Where feasible, provide technical assistance to MBEs and WBEs to increase their ability to compete effectively for the award of City contracts;

12. Work with the Director and the Controller to implement a City-wide prompt-payment policy requiring that MBEs, WBEs and LBEs be paid by the City within 30 days of the date on which the City receives an invoice from an MBE, WBE or LBE for work performed for the City;

13. Provide the Director with written notice of all contract modifications which result in an increase or decrease of the contract's dollar amount of more than 10 percent. Such notice shall be provided within 30 days of each such contract modification.

(C) Subject to the prior approval of the Director, contract awarding authorities or departments may invite, encourage or request businesses to joint venture on any contract to promote MBE or WBE participation.

(D) For the purpose of determining Minority and Women Business Enterprise participation:

Contracts awarded to joint ventures in which one or more MBEs or WBEs are combined with one or more businesses which are not Minority or Women Business Enterprises shall be deemed to be awarded to Minority or Women Business Enterprises only to the extent of the Minority or Women Business Enterprises' participation in the joint venture.

(E) All contracts subject to this ordinance shall include the following requirements, in addition to such other requirements as may be set forth elsewhere:

1. Bidders and contractors on all contracts shall be required to sign before a notary an affidavit prepared by the City Attorney, declaring under penalty of perjury their intention fully to comply with the provisions of the ordinance;

2. Contracts shall incorporate this ordinance by reference and shall provide that the wilful failure of any bidder or contractor to comply with any of its requirements shall be deemed a material breach of contract;

3. Contracts shall provide that in the event that the Director finds that any bidder, subcontractor or contractor wilfully fails to comply with any of the provisions of this ordinance, rules and regulations implementing the ordinance or contract provisions pertaining to MBE or WBE participation the bidder, subcontractor or contractor shall be liable for liquidated damages for each contract in an amount equal to the bidder's or contractor's net profit on the contract, or 10 percent of the total amount of the contract or $1,000, whichever is greatest, said amount to be determined by the Director pursuant to Section 12D.14(C). All contracts shall also contain a provision in which the bidder, subcontractor or contractor acknowledges and agrees that the liquidated damages assessed shall be payable to the City upon demand and may be set off against any monies due to the bidder, subcontractor or contractor from any contract with the City;

4. Contracts shall require bidders, contractors and subcontractors to maintain records necessary for monitoring their compliance with this ordinance;

5. Contracts shall require that during the term of the contract, the prime contractor shall fulfill the MBE and WBE participation commitments submitted with their bid;

6. Contracts shall require prime contractors to include a contract provision in any subcontract with an MBE or WBE which provides MBE and WBE subcontractors with a remedy for a prime contractor's noncompliance with his or her commitment to utilize MBE and WBE subcontractors. This contractual provision shall include an agreement by the prime contractor to compensate any MBE or WBE subcontractor if the prime contractor does not fulfill its commitment to utilize the MBE or WBE subcontractor. This contractual provision shall also state that it is enforceable in a court of competent jurisdiction;

7. Whenever contract supplements, amendments or change orders are made which cumulatively increase the total dollar value of a construction contract by more than 10 percent, the contractor shall comply with those MBE and WBE provisions of this ordinance which applied to the original contract with respect to the supplement, amendment, or change order;

8. Contracts in which subcontracting is utilized shall prohibit back contracting to the prime contractor or lower-tier subcontracting for any purpose inconsistent

with the provisions of this ordinance, rules and regulations adopted pursuant to this ordinance, or contract provisions pertaining to MBE and WBE utilization.

(F) All contracts or other agreements between the City and County of San Francisco and persons or entities, public or private, where such persons or entities receive money from or through the City for the purpose of contracting with businesses to perform public improvements, shall require such persons or entities to comply with the provisions of this ordinance in awarding and administering such contracts, except where prohibited by State or Federal law or regulation.

(G) Where a department can demonstrate, despite its good-faith efforts and application of the bid preference(s), that it has failed substantially to eliminate the exclusion of MBEs or WBEs from City contracting, the department, after consulting with the Director, may request the Contract Review Committee established in Section 12D.8(A)(3) to review and approve the proposed project(s) selected by the department for a set-aside.

(H) City department heads and commissioners shall attend a one-hour mandatory training session on an annual basis. The training session shall be organized and conducted by the Director and shall inform City department heads and commissioners of the requirements of this ordinance. (Added by Ord. 175-89, App. 5/30/89; amended by Ord. 190-91, App. 5/31/91; Ord. 76-92, App. 3/13/92; Ord. 155-92, App. 5/29/92; Ord. 284-92, App. 9/16/92; Ord. 399-95, App. 12/22/95; Ord. 278-96, App. 7/3/96)

SEC. 12D.9. ADDITIONAL FINDINGS SUPPORTING RACE- AND GENDER-CONSCIOUS BID PREFERENCES AND SUBCONTRACTOR PARTICIPATION GOALS – PUBLIC WORKS/CONSTRUCTION; SUBCONTRACTING PROGRAM. (A) In addition to the General Findings set forth in Sections 12D.2 and 12D.2-1, and based upon the record before this Board, the Board hereby makes these additional findings in support of the race- and gender-conscious bid preference provisions and subcontractor participation goals for public works/construction contracts:

1. In Ordinance No. 139-84 this Board identified discriminatory procurement practices against MBEs and WBEs in the award of prime public works/construction contracts.

2. The evidence before this Board relating to the award of prime public works/construction contracts for fiscal year 1987-1988 reflects that MBEs (each ethnic group identified as a minority) and WBEs continue to be awarded contract dollars in amounts that are disproportionately lower than the available number of MBE and WBE prime public works/construction contractors willing and able to perform City construction work. The evidence before this Board relating to the participation of MBE/WBE prime and subcontractors on City construction contracts for fiscal year 1989-1990 reflects that MBEs (each ethnic group identified as a minority) and WBEs continue to be awarded contract dollars in amounts that are disproportionately lower than the available number of MBE and WBE prime and subcontractors willing and able to perform construction work. The statistical results are the same for MBEs for fiscal year 1990-91. These

results cannot be attributed to chance. In light of the testimony before this Board and the Commission in 1983, 1984, 1988, 1989 and 1992, and the Redevelopment Agency in 1991, this Board finds that these results can be attributed in part to discriminatory procurement practices and in part to discrimination in the local construction industry against MBEs and WBEs that is manifested in and perpetuated and exacerbated by the City's procurement practices.

3. The evidence before this Board supports the conclusion that MBEs and WBEs continue to be disadvantaged by discriminatory practices when competing for City prime construction contracts. The weight of the testimony and other evidence before this Board supports the conclusion that nonminority construction contractors competing for or doing business with the City and/or in the public sector limit the participation of MBE and WBE subcontractors on construction contracts by engaging in discriminatory business practices.

4. Race-neutral measures employed by the City in the past for those construction contracts subject to the "lowest, reliable, responsible bidder" standard did not prevent the discriminatory practices from occurring. Since February 1989 the City has pursued race-neutral measures to facilitate MBE/WBE subcontractor participation in construction contracts. From about February 1st to June 30, 1989 the City adopted a race-neutral disadvantaged business program for its construction contracts. Since July 1, 1989 the City has urged prime construction contractors to voluntarily extend subcontracting opportunities to MBE/WBE subcontractors on City construction contracts. These race- and gender-neutral measures

employed by the City have not been successful in increasing MBE/WBE subcontractor participation in City construction contracts.

5. The Board is granting a competitive advantage, the bid preference, to prime MBEs and WBEs to offset the identified competitive disadvantage caused by the City's discriminatory procurement practices.

6. The evidence before this Board relating to the award of prime public works/construction contracts for fiscal year 1990-1991 reflects that WBEs have improved their participation in City construction contracts. However, based on the testimony and other evidence before this Board, the Board concludes that remedial action continues to be necessary for WBEs competing for construction contracts to overcome past discrimination in the award of construction prime and sub-contracts. The Director shall closely monitor the participation of WBEs in construction contracts and report the results of such monitoring to the board pursuant to Section 12D.6(B)2.

(B) For all public works/construction contracts, the contract awarding authority shall furnish the Director with an informational copy of all bid conditions and requests for proposals, along with a statement identifying all funds provided by any other governmental agency which will be used in payment of the contract.

(C) Architect and engineer services provided to the City in connection with a public works/construction contract are governed by Section 12D.11.

(D) **MBE/WBE Subcontracting Program.** For all public works/construction contracts in which the contract awarding authority reasonably anticipates will include subcontractor participation, the contract awarding authority, prior to the solicitation of bids, shall provide the Director with a proposed job scope, and may submit written recommendations to the Director regarding MBE and WBE subcontractor participation goals to be set for the contract. The Director shall set the participation goals pursuant to Section 12D.9.(D)-(1).

(D)-(1) Upon receipt of a proposed job scope and/or a written recommendation from a contracting awarding authority pursuant to Section 12D.9.(D), the Director shall set the MBE and WBE participation goals for each construction contract based upon the following factors:

1. The extent of subcontracting opportunities presented by the contract:

2. The availability of MBE/WBE subcontractors capable of providing goods and services on the construction contract.

The Director shall set the MBE and WBE participation goals within 10 working days of the date the Director receives from a contract awarding authority a proposed job scope and/or written recommendation. If the Director fails to act within 10 days, and if the contract awarding authority submitted to the Director recommended goals pursuant to Section 12D.9.(D), the recommended goals shall be deemed approved by the Director, provided that the recommended goals are based upon the factors identified in Subsections (D)-(1) 1 and 2 above.

(D)-(2) Bid conditions shall require bidders on prime construction contracts to do the following:

1. Demonstrate in their bid that they have used good-faith efforts to utilize MBE and WBE subcontractors;

2. Identify the particular MBEs and WBEs subcontractors to be utilized in performing the contract, specifying for each the dollar value of the participation, the type of work to be performed and such information as may reasonably be required to determine the responsiveness of the bid.

Except as provided in Section 12D.9.(D)-(5), bids not meeting the requirements of Section 12D.9.(D)-(2) shall be declared non-responsive.

(D)-(3) A contract awarding authority may request that the Director waive or reduce the MBE and WBE subcontractor participation goals on construction contracts by submitting the reasons therefor in writing to the Director prior to the solicitation of bids.

(D)-(4) A bidder or contractor may request that the Director waive or reduce the amount of MBE or WBE subcontractor participation goals on a construction contract by submitting the reasons therefor in writing to the contract awarding authority with its bid.

(D)-(5) The Director may grant the request for waiver or reduction made pursuant to Sections 12D.9.(D)-(3) and (D)-(4) upon a determination that:

1. The reasonable and necessary requirements of the construction contract render subcontracting or the participation of businesses other than bidder unfeasible;

2. Qualified MBEs and/or WBEs capable of providing the goods or services required by the contract are unavailable, despite the prime contractor's or the department's good-faith efforts to locate MBEs and WBEs to meet the participation goals; or

3. The available MBEs and WBEs have given price quotes which are unreasonably high in that they exceed competitive levels beyond amounts which can be attributed to cover costs inflated by the present effects of discrimination.

(D)-(6) Whenever the Director denies a contractor's request to waive or reduce the participation goals, the contractor may appeal that denial to the Subcontracting Goals Committee established pursuant to Section 12D.8.(A)4. The Subcontracting Goals Committee's decision on the request shall be final. In reviewing the Director's denial of a contractor's request to waive or reduce participation goals, the Subcontracting Goals Committee shall consider the extent of subcontracting opportunities presented by the contract and the availability of MBE/WBE subcontractors capable of providing goods and services on the construction contract.

The Subcontracting Goals Committee may overrule the Director and grant the request for waiver or reduction only upon finding that:

1. The reasonable and necessary requirements of the construction contract render subcontracting or the participation of businesses other than bidder unfeasible;

2. Qualified MBEs and/or WBEs capable of providing the goods or services required by the contract are unavailable, despite the prime contractor's or the department's good-faith efforts to locate MBEs and WBEs to meet the participation goals; or

3. The available MBEs and WBEs have given price quotes which are unreasonably high in that they exceed competitive levels beyond amounts which can be attributed to cover costs inflated by the present effects of discrimination.

(D)-(7) Prior to entering into any prime construction contract, the contract awarding authority shall require bidders on the contracts to contact all MBEs and WBEs before the MBE/WBEs are listed as subcontractors in the bid.

(D)-(8) During the term of the contract, any failure to comply with the level of MBE and WBE subcontractor participation specified in the contract shall be deemed a material breach of contract. (Added by Ord. 175-89, App. 5/30/89; amended by Ord. 76-92, App. 3/13/92; Ord. 155-92, App. 5/29/92)

SEC. 12D.10. ADDITIONAL FINDINGS SUPPORTING RACE- AND GENDER-CONSCIOUS BID PREFERENCES – PURCHASING CONTRACTS. (A) In addition to the general findings set forth in Sections 12D.2 and 12D.2-1, and based upon the record before this Board, the Board hereby makes these additional findings in support of the race- and gender-conscious bid preferences for purchasing contracts:

1. In Ordinance No. 139-84 this Board identified discriminatory procurement practices in the award of purchasing contracts.

2. The evidence before this Board relating to the award of contracts for fiscal year 1987-1988 reflects that MBEs (each ethnic group listed as a minority) and WBEs continue to be awarded contract dollars in certain categories of purchasing contracts in dollar amounts that are disproportionately lower than the available number of MBEs and WBEs in the private sector. These results cannot be attributed to chance. In light of the testimony before this Board and the Commission in 1983, 1984, 1988 and 1989, this Board finds that these results can only be attributed to discriminatory procurement practices.

3. The evidence before this Board supports the conclusion that MBEs and WBEs continue to be disadvantaged by discriminatory practices when competing for the aforementioned purchasing contracts.

4. Race-neutral measures employed by the City in the past for those purchasing contracts subject to the "lowest, reliable, responsible bidder" standard did not prevent the discriminatory practices from occurring.

5. The Board is granting a competitive advantage, the bid preference, to MBEs and WBEs to offset the identified competitive disadvantage caused by the City's discriminatory procurement practices.

6. The evidence before this Board relating to the award of purchasing contracts for fiscal years 1989-1990 and 1990-1991 reflects that certain minority groups have improved their participation in City purchasing contracts.

However, based on the testimony and other evidence before this Board, the Board concludes that remedial action continues to be necessary to enable these groups to overcome past discrimination in the award of purchasing contracts. The Director shall closely monitor the participation of these groups in purchasing contracts and report the results of such monitoring to the Board pursuant to Section 12D.6(B)2.

(B) Equipment and supplies contracts or general services contracts as defined herein awarded by the purchaser shall be subject to the race- and gender-conscious bid preferences of this Ordinance.

(C) In addition to the duties given the purchaser elsewhere, the purchaser shall maintain, with the assistance of the Director, a current list of Minority and Woman Business Enterprises certified by the Commission to provide each of those commodities or services subject to this Ordinance which the purchaser indicates are required by the City. The purchaser shall notify the Director prior to solicitation of bids or quotations whenever no such certified businesses are available for a contract subject to the race- and gender-conscious bid preferences of this Ordinance, unless the Director waives such notification based on the known unavailability of such qualified businesses to perform a particular contract. The Director shall attempt to identify qualified businesses, and if successful, shall notify the purchaser of their availability; the purchaser shall provide such MBEs and WBEs every practical opportunity to submit bids or quotations.

(D) The purchaser shall also maintain a central office where all bids, requests for proposals and solicitations will be listed and kept current. (Added by Ord. 175-89, App. 5/30/89; amended by Ord. 155-92, 5/29/92)

SEC. 12D.11. ADDITIONAL FINDINGS SUPPORTING THE RACE- AND GENDER-CONSCIOUS BID PREFERENCES – CONSULTANTS AND PROFESSIONAL SERVICES. (A) In addition to the general findings set forth in Sections 12D.2 and 12D.2-1, and based upon the record before this Board, the Board hereby makes additional findings in support of the race- and gender-conscious bid preferences for the following specifically enumerated professional services contracts: Legal, architect and engineer, computer systems, management consulting, medical services.

1. In Ordinance No. 139-84 this Board identified discriminatory procurement practices against MBEs and WBEs in the award of prime professional services contracts.

2. The evidence before this Board relating to the award of prime legal services contracts for fiscal year 1987-1988 reflects that Black law firms continue to be awarded contract dollars in amounts that are disproportionately lower than the available numbers of Black law firms willing and able to perform legal services for the City. These results cannot be attributed to chance. This Board finds that these results can only be attributed to discriminatory procurement practices.

The statistical evidence before this Board reflects that there are few Asian, Black, Latino and woman owned law firms certified by the Director to provide legal services to

the City. An April 1988 San Francisco Bar Association study concludes that there is significant disparity between equally qualified white and minority lawyers in terms of income, current employment positions, hiring, promotion and retention in San Francisco. The study also concludes that a high percentage of white and minority lawyers believe that racial discrimination plays a role in the employment practices of San Francisco legal employers. The report of the Judicial Council Advisory Committee on Gender Bias in the Courts on Civil Litigation and Courtroom Demeanor concludes, among other points, that opportunities for advancement and promotion in the legal profession appear less available to women than to men. In view of these studies, the Board finds that minority lawyers are excluded from employment opportunities due to discriminatory employment practices in San Francisco and that women lawyers are excluded from employment opportunities due to discriminatory practices in California. These employment practices prevent minority and women lawyers from gaining the necessary experience that would enable minority and women lawyers to compete for City legal services contracts. The City in its award of legal services contracts will become a passive participant in those practices.

The City is granting Asian, Black, Latino and woman owned law firms a bid preference pursuant to Section 12D.8.(B)2 to encourage majority law firms to joint venture with these minority and woman owned law firms when competing for the award of City contracts for legal services. Department shall also grant a seven and one-half percent (7.5%) bid/rating preference to any majority owned law firm based in San Francisco that enters into an

affirmative action program with the Director and agrees to take affirmative action to perform the following: (1) increase the recruitment, hiring, retention and advancement to partnership of minority lawyers within the firm; (2) have minority lawyers within the firm capable of providing the required services included among those who represent the City; (3) maintain and expand existing joint ventures or other formal associations with minority owned law firms, and retain and otherwise enter into joint ventures or other formal associations with minority owned law firms with which the firm does not currently have such a relationship, on legal matters of the law firm clientele calling for such a relationship; (4) request all law firms which serve as associate counsel, co-counsel or local counsel to the firm to adopt in principle these goals; (5) refer conflict of interest situations to minority owned law firms; and (6) take such additional steps as are practicable to foster and enhance relations between the majority firm and minority owned law firms, including but not limited to providing educational and training opportunities in furtherance of the objectives of this Ordinance as it relates to the legal profession. The affirmative action program developed pursuant to this subsection shall be effective for a period of 12 months after the date of agreement in writing by the law firm and the Director or the term of the legal services contract, whichever term is greater.

3. The evidence before this Board relating to the award of prime architect and engineering contracts for fiscal year 1987-1988 reflects that Black and woman owned architectural/engineering firms continue to be

awarded contract dollars in amounts that are disproportionately lower than the available numbers of Black and woman owned architectural/engineering firms willing and able to perform these services for the City. The evidence before this Board relating to the award of prime architect and engineering contracts for fiscal year 1989-1990 reflects that Asian owned architectural/engineering firms have been awarded contract dollars in amounts that are disproportionately lower than the available numbers of Asian owned architectural/engineering firms willing and able to perform these services for the City. Given that Asian owned architectural/engineering firms enjoy a relatively large share of this market, these statistically significant results cannot be attributed to chance. This Board finds that these results can only be attributed to discriminatory procurement practices.

The evidence before this Board relating to the award of prime architect and engineering contracts for fiscal year 1989-90 reflects that Latino owned architectural/engineering firms have not been awarded any contract dollars notwithstanding the available numbers of Latino owned architectural/engineering firms willing and able to perform these services for the City. Based on the statistical and other evidence before this Board, the Board concludes that the lack of participation by Latino owned architectural and engineering firms on prime architectural/engineering contracts cannot be attributed to chance. This Board finds that these results can only be attributed to discriminatory procurement practices.

4. The evidence before this Board relating to the award of prime computer systems services contracts for fiscal year 1987-1988 reflects that Asian, Black and

woman owned computer systems firms continue to be awarded contract dollars in amounts that are disproportionately lower than the available numbers of Asian, Black and woman owned computer systems firms willing and able to perform these services for the City. These results cannot be attributed to chance. This Board finds that these results can only be attributed to discriminatory procurement practices.

5. The evidence before this Board relating to the award of prime management consulting services contracts for fiscal year 1987-1988 reflects that Asian, Black and woman owned management consulting firms continue to be awarded contract dollars in amounts that are disproportionately lower than the available numbers of Asian, Black and woman owned management consulting firms willing and able to perform these services for the City. These results cannot be attributed to chance. This Board finds that these results can only be attributed to discriminatory procurement practices.

6. The evidence before this Board relating to the award of prime medical services contracts for fiscal year 1987-1988 reflects that Asian, Latino and woman owned medical services firms continue to be awarded contract dollars in amounts that are disproportionately lower than the available numbers of Asian, Latino and woman owned medical services firms willing and able to perform these services for the City. The evidence before this Board relating to the award of prime medical services contracts for fiscal year 1989-90 reflects that Black owned medical services firms are awarded contract dollars in amounts that are disproportionately lower than the available numbers of Black owned medical services firms willing

and able to perform these services for the City. These results cannot be attributed to chance. This Board finds that these results can only be attributed to discriminatory procurement practices.

7. The evidence before this Board relating to the award of prime miscellaneous professional services contracts for fiscal year 1989-1990 reflects that Asian, Latino, Black and woman owned firms which provide miscellaneous professional services are awarded contract dollars in amounts that are disproportionately lower than the available numbers of Asian, Latino, Black and woman owned firms willing and able to perform these services for the City. These results cannot be attributed to chance. This Board finds that these results can only be attributed to discriminatory procurement practices.

8. The evidence before this Board supports the conclusion that aforementioned MBEs and WBEs are disadvantaged by discriminatory practices when competing for City prime professional services contracts.

9. The Board is granting a competitive advantage, the bid preference, to the MBEs and WBEs identified as having been subject to the identified competitive disadvantage caused by the City's discriminatory procurement practices in the award of the aforementioned professional services contracts.

10. The evidence before this Board relating to the award of professional services contracts for fiscal year 1990-1991 reflects that certain minority groups have improved their participation in certain City professional services contracts. However, based on the testimony and other evidence before this Board, the Board concludes

that remedial action continues to be necessary to enable these groups to overcome past discrimination in the award of professional services contracts. The Director shall closely monitor the participation of these groups in professional services contracts and report the results of such monitoring to the Board pursuant to Section 12D.6(B)2.

(A)-(1) In addition to the general findings set forth in Section 12D.2 and the findings set forth in 12D.11(A)3, and based upon the record before this Board, the Board hereby makes these additional findings in support of establishing subcontractor participation goals for architectural/engineering contracts:

a. The evidence before this Board relating to the award of architectural and engineering prime contracts and subcontracts for fiscal years 1989-1991 shows that Black, Asian, Latino and woman owned architectural and engineering firms continue to be awarded contract dollars in amounts that are disproportionately lower than the available numbers of Black, Asian, Latino and woman owned architectural and engineering firms willing and able to perform these services for the City. These statistically significant disparities exist despite the fact that Black, Asian, Latino and woman owned firms are entitled to a bid preference on prime architectural and engineering contracts. In light of the testimony before this Board and the Commission in 1983, 1984, 1988, 1989, 1991 and 1992, the San Francisco Redevelopment Agency in 1991, and the San Francisco Unified School District in 1991 and 1992, this Board finds that these results can be attributed in part to discriminatory contracting practices and in part

to discrimination in the local architectural and engineering industries against MBE and WBE architects and engineers. This discrimination is manifested in, and perpetuated and exacerbated by, the City's contracting practices.

b. The evidence before this Board supports the conclusion that MBEs and WBEs continue to be disadvantaged by discriminatory practices when competing for City architectural and engineering contracts, and when competing to provide subcontractor services on City architectural and engineering contracts. The weight of the testimony and other evidence before this Board supports the conclusion that nonminority architects and engineers competing for or doing business with the City and/or in the private sector limit the participation of MBE and WBE subcontractors on architectural and engineering contracts by engaging in discriminatory business practices.

c. Race-neutral measures employed by the City in the past did not prevent the discriminatory practices from occurring. Since February 1989 the City has pursued race-neutral measures to facilitate MBE/WBE subcontractor participation in architectural and engineering contracts. From about February 1st to June 30, 1989 the City adopted a race-neutral disadvantaged business program for its architectural and engineering contracts. Since July 1, 1989 the City has urged prime architects and engineers to voluntarily extend subcontracting opportunities to MBE/WBE subcontractors on City architectural and engineering contracts. These race- and gender-neutral measures employed by the City have not been successful in increasing MBE/WBE participation in City architectural and engineering contracts.

(A)-(2) MBE/WBE Subcontracting Program. For all architectural and engineering contracts which the contract awarding authority reasonably anticipates will include subcontractor participation involving architectural/engineering and related services, the contract awarding authority, prior to requesting proposals, shall provide the Director with a proposed job scope, and may submit written recommendations to the Director regarding MBE and WBE subcontractor participation goals to be set for the contract. The Director shall set the participation goals pursuant to Section 12D.11(A)-(3).

(A)-(3) Upon receipt of a proposed job scope and/or a written recommendation from a contract awarding authority pursuant to Section 12D.11(A)-(2), the Director, shall set the MBE and WBE participation goals for each architectural and engineering contract based on the following factors:

1. The extent of subcontracting opportunities presented by the contract for architectural/engineering and related services;

2. The availability of MBE/WBE subcontractors capable of providing such services on the contract.

The Director shall set the MBE and WBE participation goals within 10 working days of the date the Director receives from a contract awarding authority a proposed job scope and/or written recommendation. If the Director fails to act within 10 days, and if the contract awarding authority submitted to the Director recommended goals pursuant to 12D.11(A)-(2), the recommended goals shall be deemed approved by the Director, provided that the

recommended goals are based upon the factors identified in this subsection.

(A)-(4) Requests for proposals shall require bidders on architectural and engineering contracts to do the following:

1. Demonstrate in their proposal that they have used good-faith efforts to utilize MBE and WBE subcontractors;

2. Identify the particular MBE and WBE subcontractors (which may include lower-tier MBE and WBE subcontractors) to be utilized in performing the contract, specifying for each the dollar value of participation, the type of work to be performed and such information as may reasonably be required to determine the responsiveness of the proposal.

Except as provided in Section 12D.11(A)-(7), proposals not meeting the requirements of Section 12D.11(A)-(4) shall be declared nonresponsive.

(A)-(5) A contract awarding authority may request that the Director waive or reduce the MBE and WBE subcontractor participation goals on architectural and engineering contracts by submitting the reasons therefor in writing to the Director prior to requesting proposals.

(A)-(6) A bidder may request that the Director waive or reduce the MBE and WBE subcontractor participation goals on an architectural or engineering contract by submitting the reasons therefor in writing to the contract awarding authority with its bid.

(A)-(7) The Director may grant the request for waiver or reduction made pursuant to Sections 12D.11(A)-(5) and (A)-(6) upon a determination that:

1. The reasonable and necessary requirements of the architectural or engineering contract render subcontracting or the participation of businesses other than the bidder unfeasible;

2. Qualified MBEs and/or WBEs capable of providing the services required by the contract are unavailable, despite the bidder's or the department's good-faith efforts to locate MBEs and WBEs to meet the participation goals; or

3. The available MBEs and WBEs have given price quotes which are unreasonably high in that they exceed competitive levels beyond amounts which can be attributed to cover costs inflated by the present effects of discrimination.

(A)-(8) Whenever the Director denies a bidder's request to waive or reduce the participation goals, the bidder may appeal that denial to the Subcontracting Goals Committee established pursuant to Section 12D.8(A)4. The Subcontracting Goals Committee's decision on the request shall be final. In reviewing the Director's denial of a bidder's request to waive or reduce participation goals, the Subcontracting Goals Committee shall consider the extent of subcontracting opportunities presented by the contract and the availability of MBE/WBE subcontractors capable of providing services on the contract.

The Subcontracting Goals Committee may overrule the Director and grant the request for waiver or reduction only upon finding that:

1. The reasonable and necessary requirements of the contract render subcontracting or the participation of businesses other than bidder unfeasible;

2. Qualified MBEs and/or WBEs capable of providing the services required by the contract are unavailable, despite the bidder's or the department's good-faith efforts to locate MBEs and WBEs to meet the participation goals; or

3. The available MBEs and WBEs have given price quotes which are unreasonably high in that they exceed competitive levels beyond amounts which can be attributed to cover costs inflated by the present effects of discrimination.

(A)-(9) The contract awarding authority shall require bidders on architectural and engineering contracts to contact all MBEs and WBEs listed as subcontractors in proposals before listing such MBEs and WBEs.

(A)-(10) During the term of the contract, any failure to comply with the level of MBE and WBE subcontractor participation specified in the contract shall be deemed a material breach of contract.

(A)-(11) In implementing this subcontracting program, the Director may encourage contract awarding authorities and prime contractors to take into consideration when recruiting subcontractors the degree of underutilization of MBEs and WBEs within the specific industries or subindustries called for by the contract.

(B) For all professional services contracts as defined herein, the contract awarding authority or the department making the contract award recommendation shall furnish the Director with an informational copy of all bid conditions and requests for proposals, if any, along with a statement identifying all funds provided by any other governmental agency which will be used in payment of the contract. Prior to solicitation of bids or proposals, the Director may make recommendations to the contract awarding authority with respect to provisions pertaining to MBE and WBE participation.

(C) Professional services contracts, the estimated cost of which exceeds $10,000, shall be awarded and administered in accordance with the following standards and procedures:

1. The contract awarding authority or the department making the contract award recommendation shall use good-faith efforts to solicit bids or proposals from MBEs and WBEs certified to provide the specified services. MBEs and WBEs shall be provided every practical opportunity to submit bids or proposals;

2. City departments shall include amongst consultant selection panelists individuals who are women and minorities;

3. All consultant selection panels and awarding officers shall apply the bid/rating preferences to each stage of the selection process, e.g., qualifications, proposals and interviews. Each evaluator shall score each consultant on a point system based on a predetermined evaluation criteria and predetermined point value. The selection criteria shall be based solely on objective factors that are

related to the ability of the contractor to perform the proposed project. The bid/rating preference shall be applied to the score attained by the MBE, WBE, and/or LBE as set forth in this Ordinance. If the highest score is attained by a MBE or WBE, the department shall enter into good-faith negotiations with that consultant. Subject to the prior approval of the Director and upon a showing that those negotiations were undertaken in good faith with the aforementioned MBE or WBE consultant, a department may award the contract to another competing consultant.

4. The Director is empowered to take actions as are designed to ensure compliance with the provisions of this Section, which shall include, but are not limited to:

(a) Order the suspension of the selection process;

(b) Intervene in the selection process to correct contracting practices which hinder equal business opportunities for MBEs and WBEs. (Added by Ord. 175-89, App. 5/30/89; amended by Ord. 190-91, App. 5/31/91; Ord. 344-91, App. 9/19/91; Ord. 155-92, App. 5/29/92; Ord. 284-92, App. 9/16/92)

SEC. 12D.12. GOOD-FAITH EFFORTS REQUIRED FOR OTHER CONTRACTS. (A) All City and County departments, commissions, boards, officers and employees, in the deposit of City funds and performance of their other official duties, and in the award of leases, franchises, concessions, and contracts not subject to the race- and gender-conscious bid preferences of this Ordinance shall make every good-faith effort to use the services of Minority Business Enterprises and Women Business Enterprises. Such services shall include, but are

not limited to, the financial services of banks, savings and loan companies and other commercial financial institutions, arrangement of travel and accommodations when traveling on official City business and such other services needed by City departments. Commissions and boards shall submit to the Director on an annual basis a written report on the efforts made pursuant to this Subsection.

(B) The City Treasurer, the Controller, the Health Service System and the Retirement Board shall report annually to the Director, with copies to the Mayor and the Board of Supervisors, their utilization of MBEs and WBEs. (Added by Ord. 175-89, App. 5/30/89; Ord. 278-96, App. 7/3/96)

SEC. 12D.13. EXCEPTIONS AND WAIVERS. (A) The Director shall waive the race- and gender-conscious bid preferences and good-faith efforts requirements of this ordinance under the following circumstances:

1. Whenever the Director finds, with the advice of the contract awarding authority, that needed goods or services are available only from a sole source and the prospective contractor is not currently disqualified from doing business with the City, or from doing business with any governmental agency based on a failure to comply with Minority or Women Business Enterprise or contract compliance requirements;

2. If the contract awarding authority certifies in writing to the Director that: (1) pursuant to Administrative Code Section 6.30 the contract is necessary to respond to an emergency which endangers the public health or safety and (2) there is no time to apply the bid

preference(s) and no MBEs or WBEs capable of performing the emergency work are immediately available; provided that such certification shall be made prior to the Controller's contract certification.

(B) The Director shall waive the five-percent LBE bid preference for contracts in excess of $5,000,000 whenever a contract awarding authority establishes that: (1) sufficient qualified Local Business Enterprises capable of providing the needed goods and services required by the contract are unavailable and (2) sufficient qualified businesses located outside of San Francisco capable of providing the needed goods and services required by the contract are available; or (3) the application of the five-percent LBE preference will result in significant additional costs to the City if the waiver of the bid preference is not granted.

(C) Pursuant to Administrative Code Section 6.29-2, the bid preference provisions of this ordinance are not applicable to any contract for the construction, reconstruction or repair of public buildings, streets, utilities or other public work or improvement estimated to cost in excess of $10,000,000.

(D) Pursuant to Administrative Code Section 21.11-2, the bid preference provisions of this ordinance are not applicable to any contract for the purchase of materials, supplies or equipment estimated to cost in excess of $10,000,000. (Added by Ord. 175-89, App. 5/30/89; amended by Ord. 190-91, App. 5/31/91)

SEC. 12D.14. MONITORING AND COMPLIANCE. (A) The Director shall monitor the City's progress toward achievement of the goals stated in Section 12D.3

(declaration of policy). The Director shall issue an exit report for any contract which includes MBE/WBE prime contractor participation as a joint venture partner. The purpose of the exit report is to ensure that MBE/WBEs are actually performing services on joint ventures.

(B) **Noncompliance By Contractors.** In cases where the Director has cause to believe that a contractor acting in good faith has failed to comply with any of the requirements of this ordinance, rules and regulations adopted pursuant to this ordinance, or contract provisions pertaining to MBE or WBE participation, the Director shall notify the contract awarding authority and shall attempt to resolve the noncompliance through conciliation. If the noncompliance cannot be resolved, the Director shall submit to the Commission and the contractor a written Finding of Noncompliance. The Human Rights Commission shall give the contractor an opportunity to appeal the Finding, and if the Commission concurs with the finding of the Director, it shall take such action as will effectuate the purposes of this ordinance.

(C) **Wilful or Bad Faith Noncompliance by Contractors.** In cases where the Director has cause to believe that any bidder or contractor has wilfully failed to comply with any of the provisions of this ordinance, rules and regulations adopted pursuant to this ordinance, or contract provisions pertaining to MBE or WBE participation, the Director shall be empowered to conduct an investigation and after affording the contractor notice and an opportunity to be heard, may impose sanctions for each violation of this subsection. Such sanctions shall include but are not limited to:

(a) Declare the bidder or contractor nonresponsive and ineligible to receive the award of the contract;

(b) Declare the bidder or contractor an irresponsible bidder and disqualify the bidder or contractor from eligibility for providing goods or services to the City and County for a period of five years, with a right of review and reconsideration by the Commission after two years upon a showing of corrective action indicating violations are not likely to reoccur;

(c) If the bidder or contractor is a MBE, WBE and/or LBE, revoke that business' certification as a MBE, WBE and/or LBE;

(d) Determine that the bidder or contractor has wilfully failed to comply with the provisions of this ordinance and pursuant to the provision in the contract contemplated by Section 12D.8(E)3 of the ordinance, calculate the liquidated damages for which the bidder or contractor shall be liable.

Thereafter the Director shall send a written notice to the Controller, the Mayor and to all contract awarding authorities or City department officials overseeing any contract with the bidder or contractor that a determination of a bad-faith compliance has been made and that all payments due the bidder or contractor shall be withheld as agreed to by the bidder or contractor and the City pursuant to Section 12D.8(E)3.

In addition, the Director shall transmit to the Bureau of Delinquent Revenues a report of the determination of liability and ask the Bureau of Delinquent Revenues to

coordinate efforts with the Controller and other applicable City departments to ensure that the liquidated damages are paid to the City.

The bidder or contractor may appeal the Director's decision to the Human Rights Commission, which may sustain, reverse or modify the Director's findings and sanctions imposed or take such other action as will effectuate the purposes of this ordinance.

An appeal by a contractor under this subsection shall not stay the Director's findings.

(D) The Director may require such reports, information and documentation from contractors, bidders, contract awarding authorities and the head of any department, division, or office of the City as are reasonably necessary to determine compliance with the requirements of this ordinance.

(E) **Noncompliance by City Departments.** Whenever the Director finds after investigation that a contract awarding authority has willfully failed to comply with the provisions of this ordinance, a written Finding of Noncompliance specifying the nature of the noncompliance shall be transmitted to the contract awarding authority, the Commission, the Mayor and Board of Supervisors; and

The Director shall attempt to resolve any noncompliance through conference and conciliation. Should such attempt fail to resolve the noncompliance, the Director shall transmit a copy of the Finding of Noncompliance along with a finding that conciliation was attempted and failed to the Commission which shall notify the contract

awarding agency to take appropriate action to secure compliance.

The Finding of Noncompliance shall be communicated to the Mayor and the Board of Supervisors.

(F) If the Director has reason to believe that any person has knowingly made, filed, or caused to be filed with the City any materially false or misleading statement or report made in connection with this ordinance, the Director shall report that information to the City Attorney or the District Attorney for appropriate action. The Director shall be empowered to conduct an investigation and for each violation of this subsection, 12D.14(F), to impose sanctions as set forth in Section 12D.14(C). (Added by Ord. 175-89, App. 5/30/89; amended by Ord. 278-96, App. 7/3/96)

SEC. 12D.15. REPORTING AND REVIEW; EXTENSION. (A) **Reporting by Departments.** By December 31st of each fiscal year all contract awarding authorities and departments shall report annually to the Mayor on their progress in the preceding fiscal year toward achievement of the MBE and WBE participation goals.

(B) **Reporting by the Director.**

1. The Director shall report quarterly to the Commission and the Board of Supervisors whether the goals stated in Section 12D.3 have been met in whole or in part.

2. The Director shall report to the Commission all waivers acted upon pursuant to Section 12D.13. Such report shall be made at the first Commission meeting following the granting of the waiver.

(C) **Reporting by the Commission.** By March 1st of each fiscal year subject to this ordinance, the Commission shall submit an annual report to the Mayor and the Board of Supervisors on the progress of the City toward the goals stated in Section 12D.3 of this ordinance, together with an identification of problems and specific recommendations for: (1) discontinuing the race- or gender-conscious bid preferences in those cases where the bid preferences have remedied the identified discrimination against MBEs and WBEs; and (2) improving the City's performance in remedying the identified discrimination against MBEs and WBEs.

(D) The Board of Supervisors shall act upon the Commission's recommendations by the third Board meeting of May in each fiscal year subject to this ordinance.

(E) **Review by the Commission.** This ordinance shall expire June 30, 1997 unless the Commission, after conducting public hearings, finds that the purposes identified in Section 12D.3 have not yet been achieved, in which case it shall certify said finding to the Board of Supervisors no later than 120 days prior to the expiration date. Thereafter the Board of Supervisors may extend the ordinance for additional three-year periods.

(F) **Review by the Contract Review Committee.** The Contract Review Committee established pursuant to Section 12D.8(A)3 shall have the following powers and duties:

1. To review contracts referred to it by the Director or a department for determining whether the contract should be set aside, where competition for the contract is

limited to MBEs, WBEs and/or joint ventures with MBE/WBEs;

2. Before approving a set aside of a contract, the Contract Review Committee shall first determine that: (1) the department seeking or affected by the set-aside has complied with all of the requirements of Section 12D.8(B); and (2) there are at least three business enterprises which are certified or eligible for certification as a MBE or WBE which can compete for the contract set aside.

3. After making the findings required by Section 12D.15(F)2, the Contract Review Committee may approve that a contract be set aside. However, the Contract Review Committee shall first consider the feasibility of approving a set-aside where competition is limited to joint ventures with MBE and/or WBE participation which equals or exceeds 35 percent. The Contract Review Committee shall issue its findings and approval in writing to the department affected by the set-aside.

(G) **Extension.** Pursuant to Section 12D.15(E) of Ordinance 175-89, as amended, and based upon the Additional Findings set forth in Section 12D.2-1, the Board hereby extends Ordinance 175-89, as amended, to June 30, 1997. (Added by Ord. 175-89, App. 5/30/89; amended by Ord. 190-91, App. 5/31/91; Ord. 155-92, App. 5/29/92; Ord. 278-96, App. 7/3/96)

SEC. 12D.16. CLERK OF BOARD TO TRANSMIT COPIES OF THIS CHAPTER; INFORMING CITY EMPLOYEES. The Clerk of the Board of Supervisors shall send copies of this Chapter, as amended, to every department, agency, commission and contract awarding authority in the City and County of San Francisco. Each

appointing officer of the City shall inform all employees under his or her jurisdiction of the provisions of this ordinance and of the duty of all of his or her employees to comply with the provisions of this ordinance. Each appointing officer shall also inform employees that if the employee fails to comply with the requirements of this ordinance the employee shall be subject to appropriate disciplinary action.

The Clerk of the Board of Supervisors shall also inform every department, agency, commission and contract awarding authority that whenever in accordance with the provisions of the Charter or of the Administrative Code a proposed ordinance, resolution, contract, lease, franchise, license, or other agreement or transaction is submitted to this Board for its adoption or approval, it shall be the policy of this Board to adopt legislation or approve those agreements or transactions where the department first has demonstrated in writing to this Board that the department has engaged in good-faith efforts to include the participation of MBEs and WBEs in the department's procurement and contract award practices. (Added by Ord. 190-91, App. 5/31/91)

SEC. 12D.17. IMPLEMENTING REGULATIONS. Not later than 30 days after the enactment of this ordinance, the Commission shall adopt amendments to the rules, regulations and procedures it adopted and publicly promulgated pursuant to Ordinance 175-89. The Commission shall afford the public and City departments the opportunity to provide input to and comment on the amendments to the regulations prior to their formal adoption. (Added by Ord. 175-89, App. 5/30/89; amended by Ord. 190-91, App. 5/31/91)

SEC. 12D.18. SEVERABILITY. The provisions of this ordinance are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section or portion of this ordinance, or the invalidity of the application thereof to any person or circumstances shall not affect the validity of the remainder of this ordinance, or the validity of its application to other persons or circumstances. (Added by Ord. 175-89, App. 5/30/89; amended by Ord. 190-91, App. 5/31/91)

SEC. 12D.19. EFFECTIVE DATE. This ordinance shall take effect on July 1, 1992, and shall govern all contracts for which a bid has not been solicited by the effective date. (Added by Ord. 175-89, App. 5/30/89; amended by Ord. 190-91, App. 5/31/91; Ord. 76-92, App. 3/13/92; Ord. 155-92, App. 5/29/92))

APPENDIX B

Amendment of Whole

May 8, 1997.

FILE NO 284-97-1 **ORDINANCE NO 210-97**

(Minority/Women/Local Business Utilization Ordinance III) AMENDING THE SAN FRANCISCO ADMINISTRATIVE CODE BY ADDING SECTION 12D.2-2 THERETO AND BY AMENDING SECTIONS 12D.9(A), 12D.10(A), 12D.11(A), 12D.11(A)-(1) AND 12D.15(G) THEREOF TO SET FORTH FINDINGS SUPPORTING SIX MONTH EXTENSION OF MBE/WBE/LBE ORDINANCE – III AND PROVIDING FOR THE SIX MONTH EXTENSION.

Note: Additions are underlined. Deletions are indicated by ((double parentheses))

Be it ordained by the People of the City and County of San Francisco:

Section 1. The San Francisco Administrative Code is hereby amended by adding Section 12D.2-2 thereto to read as follows:

SECTION 12D.2-2. FURTHER ADDITIONAL FINDINGS SUPPORTING SIX MONTH EXTENSION OF MBE/WBE/LBE ORDINANCE – III

Upon the expiration of Ordinance No. 175-89 this Board having adopted Ordinance No. 155-92 to address the practices and to offset the economic disadvantages identified in Sections 12D.2, 12D.9(A), 12D.10(A), 12D.11(A) and 12D.11(A)-(1);

And Ordinance No. 155-92 being remedial in nature will expire June 30, 1997 and thus required the Human

Rights Commission to study minority and woman owned business participation in City contracting prior to the expiration of Ordinance No. 155-92;

And the Human Rights Commission pursuant to Section 12D.15(E) of Ordinance No. 155-92, through its MBE/WBE/LBE Community Advisory Committee and at its regular and special meetings, having received public testimony concerning the City's compliance with Ordinance No. 155-92;

And the Human Rights Commission on January 13, 1997 having hired Mason Tillman Associates to conduct a Disparity Study which will be concluded on or before August 31, 1997;

And the Human Rights Commission, pursuant to Section 12D.15(E) of Ordinance No. 155-92 having conducted public hearings on January 29, 1997, February 19, 1997 and February 27, 1997;

And the Human Rights Commission having received from Mason Tillman Associates a statistical analysis of the MBE/WBE/LBE Progress Reports for fiscal years 1992-93, 1993-94 and 1994-95 suggesting continuing patterns of underutilization of certified MBE and WBE contractors;

And the Human Rights Commission having submitted to this Board its March 3, 1997 "Resolution Certifying HRC Findings to the Board of Supervisors Supporting the Extension of the MBE/WBE/LBE Ordinance" as well as supporting data and analyses;

And the Human Rights Commission having resolved to transmit to this Board by August 31, 1997, the completed disparity study which will assist this Board in determining whether the purposes identified in Section 12D.3 have been achieved;

And this Board incorporating by reference the findings set forth in Sections 12D.2 and 12D.2-1 above;

And this Board, having reviewed the MBE/WBE/LBE Progress Reports for fiscal years 1992-93, 1993-94, and 1994-95 and other supporting data (all of which shall be incorporated by reference) and having conducted public hearings on April 24, 1997 on the MBE/WBE program and policies and on May 8, 1997 at which the Board received additional testimony and written submittals from the public (which shall be incorporated by reference), finds that there is a good faith basis for concluding that the purposes identified in Section 12D.3 have not yet been achieved;

This Board hereby finds that there is a good faith basis to extend Ordinance 155 - 92, as amended, for a six month period during which time this Board, with the assistance of the Human Rights Commission and the City Attorney, will continue with the process of fact finding to ascertain whether a strong basis in evidence exists for concluding that the purposes identified in Section 12D.3 have not been achieved.

Section 2. The San Francisco Administrative Code is hereby amended by amending Sections 12D.9(A), 12D.10(A), 12D.11(A), 12D.11(A)-(1), and 12D.15(G) thereof to read as follows:

SEC. 12D.9. ADDITIONAL FINDINGS SUPPORTING RACE- AND GENDER-CONSCIOUS BID PREFERENCES AND SUBCONTRACTOR PARTICIPATION GOALS – PUBLIC WORKS/CONSTRUCTION; SUBCONTRACTING PROGRAM. (A) In addition to the General Findings set forth in Section 12D.2, ((and)) 12D.2.1, and 12D.2-2 and based upon the record before this Board, the Board hereby makes these additional findings in support of the race- and gender-conscious bid preference provisions and subcontractor participation goals for public works/construction contracts:

1. In Ordinance No. 139-84 this Board identified discriminatory procurement practices against MBEs and WBEs in the award of prime public works/construction contracts.

2. The evidence before this Board relating to the award of prime public works/construction contracts for fiscal year 1987-1988 reflects that MBEs (each ethnic group identified as a minority) and WBEs continue to be awarded contract dollars in amounts that are disproportionately lower than the available number of MBE and WBE prime public works/construction contractors willing and able to perform City construction work. The evidence before this Board relating to the participation of MBE/WBE prime and subcontractors on City construction contracts for fiscal year 1989-1990 reflects that MBEs (each ethnic group identified as a minority) and WBEs continue to be awarded contract dollars in amounts that are disproportionately lower than the available number of MBE and WBE prime and subcontractors willing and able to perform construction work. The statistical results are the same for MBEs for fiscal year 1990-91. These

results cannot be attributed to chance. In light of the testimony before this Board and the Commission in 1983, 1984, 1988, 1989 and 1992, and the Redevelopment Agency in 1991, this Board finds that these results can be attributed in part to discriminatory procurement practices and in part to discrimination in the local construction industry against MBEs and WBEs that is manifested in and perpetuated and exacerbated by the City's procurement practices.

3. The evidence before this Board supports the conclusion that MBEs and WBEs continue to be disadvantaged by discriminatory practices when competing for City prime construction contracts. The weight of the testimony and other evidence before this Board supports the conclusion that nonminority construction contractors competing for or doing business with the City and/or in the public sector limit the participation of MBE and WBE subcontractors on construction contracts by engaging in discriminatory business practices.

4. Race-neutral measures employed by the City in the past for those construction contracts subject to the "lowest, reliable, responsible bidder" standard did not prevent the discriminatory practices from occurring. Since February 1989 the City has pursued race-neutral measures to facilitate MBE/WBE subcontractor participation in construction contracts. From about February 1st to June 30, 1989 the City adopted a race-neutral disadvantaged business program for its construction contracts. Since July 1, 1989 the City has urged prime construction contractors to voluntarily extend subcontracting opportunities to MBE/WBE subcontractors on City construction contracts. These race- and gender-neutral measures

employed by the City have not been successful in increasing MBE/WBE subcontractor participation in City construction contracts.

5. The Board is granting a competitive advantage, the bid preference, to prime MBEs and WBEs to offset the identified competitive disadvantage caused by the City's discriminatory procurement practices.

6. The evidence before this Board relating to the award of prime public works/construction contracts for fiscal year 1990-1991 reflects that WBEs have improved their participation in City construction contracts. However, based on the testimony and other evidence before this Board, the Board concludes that remedial action continues to be necessary for WBEs competing for construction contracts to overcome past discrimination in the award of construction prime and sub-contracts. The Director shall closely monitor the participation of WBEs in construction contracts and report the results of such monitoring to the board pursuant to Section 12D.6(B)2.

SEC. 12D.10. ADDITIONAL FINDINGS SUPPORTING RACE- AND GENDER-CONSCIOUS BID PREFERENCES – PURCHASING CONTRACTS. (A) In addition to the general findings set forth in Sections 12D.2, ((and)) 12D.2-1 and 12D.2-2, and based upon the record before this Board, the Board hereby makes these additional findings in support of the race- and gender-conscious bid preferences for purchasing contracts:

1. In Ordinance No. 139-84 this Board identified discriminatory procurement practices in the award of purchasing contracts.

2. The evidence before this board relating to the award of contracts for fiscal year 1987-1988 reflects that MBEs (each ethnic group listed as a minority) and WBEs continue to be awarded contract dollars in certain categories of purchasing contracts in dollar amounts that are disproportionately lower than the available number of MBEs and WBEs in the private sector. These results cannot be attributed to chance. In light of the testimony before this Board and the Commission in 1983, 1984, 1988 and 1989, this Board finds that these results can only be attributed to discriminatory procurement practices.

3. The evidence before this Board supports the conclusion that MBEs and WBEs continue to be disadvantaged by discriminatory practices when competing for the aforementioned purchasing contracts.

4. Race-neutral measures employed by the City in the past for those purchasing contracts subject to the "lowest, reliable, responsible bidder" standard did not prevent the discriminatory practices from occurring.

5. The Board is granting a competitive advantage, the bid preference, to MBEs and WBEs to offset the identified competitive disadvantage caused by the City's discriminatory procurement practices.

6. The evidence before this Board relating to the award of purchasing contracts for fiscal years 1989-1990 and 1990 and 1991 reflects that certain minority groups have improved their participation in City purchasing contracts. However, based on the testimony and other evidence before this Board, the Board concludes that remedial action continues to be necessary to enable these groups to overcome past discrimination in the award of

purchasing contracts. The Directors shall closely monitor the participation of these groups in purchasing contracts and report the results of such monitoring to the Board pursuant to Section 12D.6(B)(2).

SEC. 12D.11. ADDITIONAL FINDINGS SUPPORTING THE RACE AND GENDER CONSCIOUS BID PREFERENCES - CONSULTANTS AND PROFESSIONAL SERVICES. (A) In addition to the general findings set forth in Sections 12D.2, ((and)) 12D.2-1 and 12D.2-2, and based upon the record before this Board, the Board hereby makes additional findings in support of the race- and gender-conscious bid preferences for the following specifically enumerated professional services contracts: Legal, architect and engineer, computer systems, management consultant, medical services.

1. In Ordinance No. 139-84 this Board identified discriminatory procurement practices against MBEs and WBEs in the award of prime professional services contracts.

2. The evidence before this Board relating to the award of prime legal services contracts for fiscal year 1987-1988 reflects that Black law firms continue to be awarded contract dollars in amounts that are disproportionately lower than the available numbers of Black law firms willing and able to perform legal services for the City. These results cannot be attributed to chance. This Board finds that these results can only be attributed to discriminatory procurement practices.

The statistical evidence before this Board reflects that there are few Asian, Black, Latino and woman owned law firms certified by the Director to provide legal services to

the City. An April 1988 San Francisco Bar Association study concludes that there is significant disparity between equally qualified white and minority lawyers in terms of income, current employment positions, hiring, promotion and retention in San Francisco. The study also concludes that a high percentage of white and minority lawyers believe that racial discrimination plays a role in the employment practices of San Francisco legal employers. The report of the Judicial Council Advisory Committee on Gender Bias in the Courts on Civil Litigation and Courtroom Demeanor concludes, among other points, that opportunities for advancement and promotion in the legal profession appear less available to women than to me. In view of these studies, the Board finds that minority lawyers are excluded from employment opportunities due to discriminatory employment practices in San Francisco and that women lawyers are excluded from employment opportunities due to discriminatory practices in California. These employment practices prevent minority and women lawyers from gaining the necessary experience that would enable minority and women lawyers to compete for City legal services contracts. The City in its award of legal services contracts will become a passive participant in those practices.

The City is granting Asian, Black, Latino and woman owned law firms a bid preference pursuant to Section 12D.8(B)2 to encourage majority law firms to joint venture with these minority and woman owned law firms when competing for the award of City contracts for legal services. Departments shall also grant a seven and one-half percent (7.5%) bid/rating preference to any majority owned law firm based in San Francisco that enters into an

affirmative action program with the Director and agrees to take affirmative action to perform the following: (1) increase the recruitment, hiring, retention and advancement to partnership of minority lawyers within the firm; (2) have minority lawyers within the firm capable of providing the required services included among those who represent the City; (3) maintain and expand existing joint ventures or other formal associations with minority owned law firms, and retain and otherwise enter into joint ventures or other associations with minority owned law firms with which the firm does not currently have such a relationship, on legal matters of the law firm clientele calling for such a relationship; (4) request all law firms which serve as associate counsel, co-counsel or local counsel to the firm to adopt in principle these goals; (5) refer conflict of interest situations to minority owned law firms; and (6) take such additional steps as are practicable to foster and enhance relations between the majority firm and minority owned law firms, including but not limited to providing educational and training opportunities in furtherance of the objectives of this Ordinance as it relates to the legal profession. The affirmative action program developed pursuant to this subsection shall be effective for a period of 12 months after the date of agreement in writing by the law firm and the Director or the term of the legal services contract, whichever term is greater.

3. The evidence before this Board relating to the award of prime architect and engineering contracts for fiscal year 1987-1988 reflects that Black and woman owned architectural/engineering firms continue to be

awarded contract dollars in amounts that are disproportionately lower than the available numbers of Black and woman owned architectural/engineering firms willing and able to perform these services for the City. The evidence before this Board relating to the award of prime architect and engineering contracts for fiscal year 1989-1990 reflects that Asian owned architectural/engineering firms have been awarded contract dollars in amounts that are disproportionately lower than the available numbers of Asian owned architectural/engineering firms willing and able to perform these services for the City. Given that Asian owned architectural/engineering enjoy a relatively large share of this market, these statistically significant results cannot be attributed to chance. This Board finds that these results can only be attributed to discriminatory procurement practices.

The evidence before this Board relating to the award of prime architect and engineering contracts for fiscal year 1989-90 reflects that Latino owned architectural/engineering firms have not been awarded any contract dollars notwithstanding the available numbers of Latino owned architectural/engineering firms willing and able to perform these services for the City. Based on the statistical and other evidence before this Board, the Board concludes that the lack of participation by Latino owned architectural and engineering firms on prime architectural/engineering contracts cannot be attributed to chance. This Board finds that these results can only be attributed to discriminatory procurement practices.

4. The evidence before this Board relating to the award of prime computer systems services contracts for fiscal year 1987-1988 reflects that Asian, Black and

woman owned computer systems firms continue to be awarded contract dollars in amounts that are disproportionately lower than the available numbers of Asian, Black and woman owned computer systems firms willing and able to perform these services for the City. These results cannot be attributed to chance. This Board finds that these results can only be attributed to discriminatory procurement practices.

5. The evidence before this Board relating to the award of prime management consulting services contracts for fiscal year 1987-1988 reflects that Asian, Black and woman owned management consulting firms continue to be awarded contract dollars in amounts that are disproportionately lower than the available numbers of Asian, Black and woman owned management consulting firms willing and able to perform these services for the City. These results cannot be attributed to chance. This Board finds that these results can only be attributed to discriminatory procurement practices.

6. The evidence before this Board relating to the award of prime medical services contracts for fiscal year 1987-1988 reflects that Asian, Latino and woman owned medical services firms continue to be awarded contract dollars in amounts that are disproportionately lower than the available numbers of Asian, Latino and woman owned medical services firms willing and able to perform these services for the City. The evidence before this Board relating to the award of prime medical services contracts for fiscal year 1989-90 reflects that Black owned medical services firms are awarded contract dollars in amounts that are disproportionately lower than the available numbers of Black owned medical services firms willing

and able to perform these services for the City. These results cannot be attributed to chance. This Board finds that these results can only be attributed to discriminatory procurement practices.

7. The evidence before this Board relating to the award of prime miscellaneous professional services contracts for fiscal year 1989-1990 reflects that Asian, Latino, Black and woman owned firms which provide miscellaneous professional services are awarded contract dollars in amounts that are disproportionately lower than the available numbers of Asian, Latino, Black and woman owned firms willing and able to perform these services for the City. These results cannot be attributed to chance. The Board finds that these results can only be attributed to discriminatory procurement practices.

8. The evidence before this Board supports the conclusion that aforementioned MBEs and WBEs are disadvantaged by discriminatory practices when competing for City prime professional services contracts.

9. The Board is granting a competitive advantage, the bid preference, to the MBEs and WBEs identified as having been subject to the identified competitive disadvantage caused by the City's discriminatory procurement practices in the award of the aforementioned professional services contract.

10. The evidence before this Board relating to the award of professional services contracts for fiscal year 1990-1991 reflects that certain minority groups have improved their participation in certain City professional services contracts. However, based on the testimony and other evidence before this Board, the Board concludes

that remedial action continues to be necessary to enable these groups to overcome past discrimination in the award of professional services contracts. The Director shall closely monitor the participation of these groups in professional services contracts and report the results of such monitoring to the Board pursuant to Section 12D.6(B)2.

(A)(1) In addition to the general findings set forth in Section 12D.2 and the findings set forth in Section 12D.2-2 and 12D.11(A)3, and based upon the record before this Board, the Board hereby makes these additional findings in support of establishing subcontractor participation goals for architectural/engineering contracts:

a. The evidence before this Board relating to the award of architectural and engineering prime contracts and subcontracts for fiscal years 1989-1991 shows that Black, Asian, Latino and woman owned architectural and engineering firms continue to be awarded contract dollars in amounts that are disproportionately lower than the available numbers of Black, Asian, Latino and woman owned architectural and engineering firms willing and able to perform these services for the City. These statistically significant disparities exist despite the fact that Black, Asian, Latino and woman owned firms are entitled to a bid preference on prime architectural and engineering contracts. In light of the testimony before this Board and the Commission in 1983, 1984, 1988, 1989, 1991 and 1992, the San Francisco Redevelopment Agency in 1991, and the San Francisco Unified School District in 1991 and 1992, this Board finds that these results can be attributed in part to discriminatory contracting practices and in part

to discrimination in the local architectural and engineering industries against MBE and WBE architects and engineers. This discrimination is manifested in, and perpetuated and exacerbated by, the City's contracting practices.

b. The evidence before this Board supports the conclusion that MBEs and WBEs continue to be disadvantaged by discriminatory practices when competing for City architectural and engineering contracts, and when competing to provide subcontractor services on City architectural and engineering contracts. The weight of the testimony and other evidence before this Board supports the conclusion that nonminority architects and engineers competing for or doing business with the City and/or in the private sector limit the participation of MBE and WBE subcontractors on architectural and engineering contracts by engaging in discriminatory business practices.

c. Race-neutral measures employed by the City in the past did not prevent the discriminatory practices from occurring. Since February 1989 the City has pursued race neutral measures to facilitate MBE/WBE subcontractor participation in architectural and engineering contracts. From about February 1st to June 30, 1989 the City adopted a race-neutral disadvantaged business program for its architectural and engineering contracts. Since July 1, 1989 the City has urged prime architects and engineers to voluntarily extend subcontracting opportunities to MBE/WBE subcontractors on City architectural and engineering contracts. These race and gender neutral measures employed by the City have not been successful in the increasing MBE/WBE participation in City architectural and engineering contracts.

SEC. 12D.15(G) Extension. Pursuant to Section 12D.15(E) of Ordinance 155-92 ((175-89)), as amended, and based upon the Further Additional Findings Supporting Six Month Extension of MBE/WBE/LBE Ordinance – III set forth in Section 12D.2-2 ((Additional Findings set forth in Section 12D.2-1)), the Board hereby extends Ordinance 155-92 ((175-89)), as amended, to ((June 30, 1997)) December 31, 1997.

APPROVED AS TO FORM

LOUISE H. RENNE, City Attorney

By: /s/ Mara E. Rosales
MARA E. ROSALES
Deputy City Attorney

Supreme Court, U.S.
FILED
SEP 18 1997
CLERK

No. 97-369

In The

Supreme Court of the United States

October Term, 1996

COALITION FOR ECONOMIC EQUITY, ET AL.,

Petitioners,

v.

PETE WILSON, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE OF DELAINE EASTIN IN SUPPORT OF PETITION OF COALITION FOR ECONOMIC EQUITY, ET AL.

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September 18, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Defendant-respondent Delaine Eastin, California Superintendent of Public Instruction, in her official capacity, hereby supports the petition of plaintiffs-petitioners, Coalition for Economic Equity, et al., for writ of certiorari.

Defendant-respondent Eastin takes no position on the merits of the case. Defendant-respondent Eastin's support of the plaintiffs-petitioners is based upon the importance of existing important public education programs in kindergarten through twelfth grade that will be eliminated or modified as a result of Proposition 209. The issues raised by petitioners are of exceptional importance to public education in the State of California. The over one thousand school districts and all county offices of education in California have programs established and funded by the legislature targeting racial minorities and girls. School districts have been operating programs targeting racial minorities for years; some programs, such as the voluntary desegregation programs, have been in operation for over a decade. The state legislature continued to fund programs targeting racial minorities and girls for the 1997-98 school year in this year's budget signed by the Governor. Programs targeting racial minorities, including programs designed to eliminate the effects of racial segregation, will be required to be modified or eliminated as a result of Proposition 209.

Education is a fundamental right in California. Racial minorities were the victims of segregation in public education in California. Educational programs designed to eliminate the effects of segregation by targeting racial minorities will likely be eliminated as a result of Proposition 209. The issue of whether a state can eliminate all public education programs targeting racial minorities,

including programs designed to eliminate the effects of segregation, is one of exceptional importance. Superintendent Delaine Eastin urges this court to grant the petition for writ of certiorari.

Respectfully submitted,

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Counsel of Record
JOANNE LOWE
JANET MCCORMICK

Supreme Court, U.S.
FILED
SEP 29 1997
CLERK

No. 97-369

In The

Supreme Court of the United States

October Term, 1996

COALITION FOR ECONOMIC EQUITY, et al.,

Petitioners,

v.

PETE WILSON, Governor of the State of California, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the California Constitution may, consistent with the Equal Protection Clause, as construed in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School Dist., No. 1*, 458 U.S. 457 (1982), prohibit state and local governments from enacting race- or gender-based preferences?

2. Whether a statewide initiative prohibiting preferences based upon race or gender, including such preferences as might be constitutionally permissible under the *Croson* strict scrutiny analysis, contravenes the holding in *Romer v. Evans*, 116 S.Ct. 1620 (1996)?

3. Whether a statewide initiative banning race- and gender-based preferences conflicts with and, therefore, is pre-empted by Title VII?

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STATEMENT OF THE CASE

On November 5, 1996, the people of the State of California adopted an amendment to their Constitution by popular vote. The amendment appeared on the ballot as Proposition 209 and added section 31 to Article I of the California Constitution. The section provides in part:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

The California Legislative Analyst's Ballot Analysis of the measure distributed to the voters stated that it "would eliminate state and local government affirmative action programs in the areas of public employment, public education and public contracting to the extent these programs involve 'preferential treatment' based on race, sex, color, ethnicity, or national origin." State Resp. Brief App. 3a. However, the Analyst noted the specific programs affected by the measure would depend on "court rulings on what types of activities are considered 'preferential treatment.' " *Id.* With respect to public schools, the Legislative Analyst stated "[t]he measure *could* eliminate or cause fundamental changes to, *voluntary* desegregation programs run by school districts." *Id.* at 5a (first emphasis added). However, the analysis made clear that such programs would be affected only to the extent they involved preferences and were not court-ordered. Specifically, the Analyst noted that "magnet" schools could only be affected "in those cases where race or ethnicity are preferential factors in the admission of students." *Id.*

On November 6, 1996, the day after the statewide election at which Proposition 209 was enacted, and before

the California courts had an opportunity to consider the application of the measure to any concrete situation, the petitioners (a number of individuals and groups claiming to represent minorities and women) filed suit in the United States District Court for the Northern District of California against certain state officials ("state respondents") and other governmental defendants seeking to restrain the enforcement of Proposition 209 on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and is preempted by Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972. *Coalition For Economic Equity v. Wilson*, 110 F.3d 1431, 1435 (9th Cir. 1997). A number of the governmental defendants who were themselves opposed to Proposition 209, including the City and County of San Francisco, aligned themselves with the position of the plaintiffs/appellees. *Id.* at 1435 n.2. The district court permitted Californians Against Discrimination and Preferences, an organization of proponents of Proposition 209, to intervene as a defendant. *Id.* at 1436. The district court issued a temporary restraining order and, later, a preliminary injunction against the enforcement of the preferential treatment ban in Proposition 209.[1] *Coalition For Economic Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Ca. 1996); *see also Coalition For Economic Equity v. Wilson*, 110 F.3d at 1435.

The state respondents and the intervenor respondent appealed the issuance of the preliminary injunction. The Ninth Circuit Court of Appeals unanimously reversed the

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[1] The district court certified both a plaintiff class of all persons aggrieved by the preference ban of Proposition 209 and a defendant class of State officials and public agencies that would enforce the ban. *Coalition For Economic Equity v. Wilson*, 110 F.3d at 1435 n.3.

district court and vacated the injunction, finding that its decision was based upon an erroneous legal premise. First, using a "conventional" equal protection analysis, the court of appeals held that Proposition 209's ban on unequal treatment on the basis of race and gender *a fortiori* does not deny equal protection of the law; otherwise, "the central tenet of the Equal Protection Clause teeters on the brink of incoherence." *Id.* at 1439. Secondly, it rejected the argument that Proposition 209 reallocated authority in a racially discriminatory manner as occurred in *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), because the measure does not create an exception for the treatment of race or gender issues, but rather, addresses those matters in a neutral fashion. *Id.* at 1443-1446. According to the court of appeals, impediments to preferential treatment do not deny equal protection. *Id.* at 1445. Finally, the court of appeals found that Proposition 209 was not preempted by Title VII since Congress expressly provided that state anti-discrimination laws that do not require or authorize a violation of its provisions are not preempted, and that the one command in Title VII regarding race and gender preferences makes it clear that such preferences are not required by Title VII, which is entirely consistent, the court found, with Proposition 209. *Id.* at 1447-1448.

REASONS FOR DENYING THE WRIT

1. This Facial Challenge Does Not Present Concrete Issues Related to the Application of Proposition 209 Which Has Yet to be Construed by California Courts.

Petitioners assert certiorari should be granted because the issue of whether and to what extent a state may limit the flexibility of public agencies to employ race

and gender preferences permitted or required by the Equal Protection Clause, "is one of fundamental and nationwide social and political importance." Petition at 9. Whatever nationwide interest and political importance may be attributed to the enactment of Proposition 209, the court of appeals' decision – that a measure that bans race and gender preferences is consistent with the Equal Protection Clause and Title VII – does not conflict with decisions of this Court and requires no "resolution" by this Court.

This case presents a facial challenge to Proposition 209 before it has been applied or interpreted by California courts. Yet, as this Court noted in *Arizonans For Official English v. Arizona*, ___ U.S. ___, 117 S.Ct. 1055 (1997), "[f]ederal courts lack competence to rule definitively on the meaning of state legislation . . . nor do they adjudicate challenges to state measures absent a showing of actual impact on the challenger. . . . " *Id.* at 1059. In the absence of any state court interpretation of the measure it is unclear exactly what the full impact of Proposition 209 will be in any particular application. However, state courts, like federal courts, are bound to construe a legislative enactment to fall within constitutional bounds if it is possible to do so. *Id.* at 1074. It must be presumed that California courts will not construe it in such a fashion as to violate the United States Constitution.

Moreover, since this is a facial challenge under both the Equal Protection Clause and the Supremacy Clause, the fact that in some hypothetical case involving a particular set of circumstances the application of Proposition 209 may raise issues of preemption or constitutionality does not support certiorari. That legislation might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.

United States v. Salerno, 481 U.S. 739, 745 (1987); *Ohio v. Akron Ctr. For Reproductive Health*, 497 U.S. 502, 514 (1990) (state legislation should not be invalidated based on a worst case scenario that may never occur). Likewise, "[t]he existence of a hypothetical or potential conflict is insufficient to warrant the preemption of a state statute." *Rice v. Williams Co.*, 458 U.S. 654, 659 (1982). The Court must "consider the relationship between the state and the federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Roth Packing Co.*, 430 U.S. 519, 525-526 (1977).

In *Salerno*, this Court rejected a facial challenge where the statute was constitutional as applied in a large number of cases. 481 U.S. 749-750. Here, too, Proposition 209 is admittedly constitutional under most circumstances and as applied in a large fraction of cases. First, it would eradicate existing race and gender preferences that would not survive strict scrutiny.[2] Second, Proposition 209 would

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[2] Petitioners have suggested that since race- and gender-based affirmative action programs must meet federal constitutional standards, the only practical effect of Proposition 209 is to eliminate programs that would survive heightened scrutiny required by the Fourteenth Amendment. This assumes that all affirmative action programs, in fact, meet federal constitutional standards. Recent cases like *Engineering Contractors Association v. Metropolitan Dade County*, ___ F.3d ___, 1997 WL 535626 (11th Cir. 1997), and *Monterey Mechanical v. California State University*, ___ F.3d ___, 1997 WL 538757 (9th Cir. 1997), make it abundantly clear that this assumption is unwarranted. In those cases, and other cases, courts have determined that required findings of past discrimination by state or local entities were either non-existent, or sorely lacking.

In *Monterey Mechanical*, the Ninth Circuit struck down a California statute that established goals for participation by minorities and women in public contracting nine years after the

eliminate race and gender preferences which are constitutionally permissible, but not constitutionally required.[3] In both respects, it is consistent with the Constitution.

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decision in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), established the strict scrutiny standard for review of such preference programs. The court found that "the state made absolutely no attempt to justify the ethnic and sex discrimination it imposed" 1997 WL 538757 at *12. Hence, despite the lack of any evidence that remedial action was necessary, the statute impacted virtually every state contract for more than nine years. By eradicating constitutionally impermissible preferences, Proposition 209 serves the Constitution.

[3] It is undisputed that programs which could survive the heightened scrutiny required by the Fourteenth Amendment as interpreted in *Croson* and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), are generally permissible and not required. *See* Pet. 11-12. In *Adarand*, the Court adopted the analysis of *Croson* that race-based affirmative action programs must be justified by strict scrutiny. 515 U.S. at 222. *Adarand* did not address the issue of under what circumstances these remedial programs are *mandated*, but rather when "the government is not disqualified" from using preferences. *Id.* at 237. To justify a program under *Adarand* and *Croson*, a government agency is not required to find that it is guilty of discrimination or that it is perpetuating its own discrimination, but instead that a strong basis in evidence exists for concluding remedial action is necessary. *See Adarand*, 515 U.S. at 222; *Croson*, 488 U.S. at 500 (plurality opinion); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion). Moreover, a program may be initiated when government affects discrimination in the private sector. *Croson*, 488 U.S. at 503-504 (plurality opinion). However, nothing therein suggests that the Equal Protection Clause *requires* affirmative action programs. *Austin Black Contractors Association v. City of Austin*, 78 F.3d 185, 186 n.3 (5th Cir. 1996) (per curiam) (citing cases); *Associated General Contractors of California v. San Francisco Unified School District*, 616 F.2d 1381 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980).

Third, Proposition 209 does not impact those race- and gender-conscious measures designed to eliminate discrimination but which do not grant preferential treatment on the basis of race or gender. To be sure, state and local governments have an affirmative obligation to take action to eliminate their own discrimination and its vestiges. *See e.g., United States v. Fordice*, 505 U.S. 717, 727-728 (1992); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 291 (1986) (opinion of O'Connor, J.). In some cases the remedy may be race-conscious, as in altering student attendance patterns to achieve desegregation. However, as the Ninth Circuit noted, not all race-conscious or gender-conscious remedies involve discriminatory preferences. *Coalition for Economic Equality v. Wilson*, 110 F.3d at 1438 n.7, 1445 n.16. Nothing suggests that a government agency initiating a voluntary affirmative action program to remedy past discrimination is ever obligated to provide preferences on the basis of race to persons who are not actual victims of discrimination.[4] *Cf. Bazemore v. Friday*, 478 U.S. 385, 407-408 (1986) (White, J., concurring.).

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[4] In a "Response Supporting Petition for Writ of Certiorari," the City and County of San Francisco, the County of Marin, and the City of Pasadena appear to argue that public entities face a *duty* to grant racial preferences under certain circumstances. Response at 12-16. San Francisco suggests that it had a duty to enact an ordinance which grants bid preferences to minority- and woman-owned businesses in City contracting. In support of this point San Francisco cites findings that it discriminated in public contracting, that race-neutral remedial efforts were inadequate, and that, therefore, the racial preferences which the City adopted were constitutionally required. In fact, the only judicial findings relating to San Francisco's preference program made by the court of appeals were that the trial court had neither abused its discretion nor made clearly erroneous findings of fact in denying preliminary

Fourth, because Proposition 209 is an anti-discrimination law, it fully permits remedial action which restores actual victims of discrimination to their "rightful place". Such remedial action is not a preference prohibited by Proposition 209.[5] *See Coalition for Economic Equity v. Wilson* 110 F.3d at 1438 n.7. Petitioners do not contend that Proposition 209 prevents a public employer from complying with either a state or federal court order mandating a race-preferential or gender-preferential remedy based upon a finding of a violation of the Equal Protection Clause or of Title VII. Petition at 15 n.12. Indeed, State or federal courts enforcing a federal statute are not limited by state law.[6]

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relief. *Associated General Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401, 1405, 1414 (9th Cir.1991).

These "respondents" also argue that Proposition 209 is particularly harmful because the jurisdictional and procedural constraints on the authority of state or local subdivisions to remedy discrimination under *Croson* purportedly render only local governments able to remedy local discrimination. Response at 10. Ironically, the very passage from *Croson* cited to support this argument expressly notes that political subdivisions must be delegated that requisite authority by the State. 488 U.S. at 491-492 n.2 (noting undisturbed finding that city had authority to enact set-aside program under state law).

[5] Subdivision (d) of Proposition 209 provides that prior consent decrees and orders are not invalidated. Petitioners read subdivision (d) to mean that "Proposition 209 makes no allowance for preferences that a state court would otherwise order as remediation for adjudicated violations of state constitutional or statutory antidiscrimination law." Petition at 15. However, Proposition 209 does not prohibit a court from taking whatever steps are necessary to secure a remedy for actual victims of a violation of state or federal law.

[6] Courts have treated race-preferential or gender-preferential remedies as strong medicine with serious side

Petitioners posit one "conceivable" circumstance in which there would be an affirmative duty on the part of state and local governments to employ race preferences and gender preferences, namely, "[w]here a court *would properly order* such a constitutional remedy." Petition at 11 (emphasis added). The "issue" underlying this vague hypothetical – whether, in the absence of a court order, preferences to non-victims of discrimination need ever be initiated by a public agency in lieu of actual compensation or other relief to the actual victims – is highly factual. That extreme factual situation is not before this Court. It may or may not be presented when courts begin to address an *application* of Proposition 209 in a specific fact context. Should the issue arise in a concrete situation, state courts, like federal courts, are bound to construe a legislative enactment to fall within constitutional bounds if it is possible to do so. *Arizonans For Official English v.*

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effects to be used as a "last resort" in only the most egregious circumstances. This Court in *United States v. Paradise*, 480 U.S. 149 (1987), upheld a court-ordered remedy for a proven violation of the Equal Protection Clause which required a public agency to promote qualified black employees on a quota basis. A more extreme case can hardly be conceived. For many years, the defendant in *Paradise* had ignored court orders and failed to honor consent decrees which committed the defendant to establish a testing procedure which did not discriminate against blacks. Given defendant's intransigence and the particular circumstances, the court used the only effective remedy available to it under the circumstances. *Paradise*, 480 U.S. at 176-177. Significantly, however, this remedy was applicable only until the defendant established a procedure which did not have a discriminatory impact on blacks. The decision in *Paradise* was supported not only by the governmental interest in eradicating discriminatory practices, but also by the societal interest in ensuring compliance with the judgments of federal courts. 480 U.S. at 170-171.

Arizona, 117 S.Ct. at 1074. Therefore, it must be presumed that California courts will construe Proposition 209 in such a fashion as to be consistent with the United States Constitution. Petitioners' hypothetical case that, depending on the facts and the California courts' interpretation of Proposition 209, there might be a conflict between Proposition 209 and federal law, does not provide a basis for invalidating the measure on its face. Nor does it present an issue of nationwide importance such as to warrant certiorari.

2. Since Proposition 209 is Not Inconsistent with the Rule of *Washington v. Seattle School District No. 1* and *Hunter v. Erickson*, There is No Reason to Grant Certiorari in this Case.

Notwithstanding the fact that Proposition 209 demands equality of treatment without regard to race or gender in government employment, contracting, and education, the petitioners claim that it creates both a racial and gender classification which cannot be justified. Specifically, they contend that the measure reallocates governmental decision-making to place an unusual burden on the interests of minorities and women in violation of the rule established in *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982). *Hunter* and *Seattle* together stand for the proposition that the Equal Protection Clause's guarantee is violated when a law alters the governmental decision-making process to thereby impose substantial and peculiar burdens on racial minorities.[7] *Seattle*, 458 U.S. at 485.

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[7] Petitioners also contend that women, who historically have been the victims of gender discrimination, are in the same

A. Peculiar Burden Analysis

Respondents submit the Ninth Circuit correctly rejected these contentions, that court having perceived that Proposition 209 is not a measure which burdens other measures or processes designed to ensure equal treatment; instead Proposition 209 demands equal treatment by its own terms. The court observed Proposition 209 does not isolate race or gender antidiscrimination laws from any specific area over which the state has delegated authority to a local entity, nor does it treat race and gender antidiscrimination laws in one area differently from such laws in another area – it simply prohibits *all* race and gender preferences by state entities. As will be explained, the Ninth Circuit's decision poses no conflict with this Court's decisions in *Seattle* and *Hunter*, and does not call for certiorari.

Initially, the court of appeals applied a conventional equal protection analysis. *Coalition for Economic Equity v. Wilson*, 110 F.3d at 1439-1441. Rather than classifying individuals by race or gender, Proposition 209, the court held, prohibits the State from making such classifications. "Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense." *Id.* at 1440. It does not appear petitioners question this finding.[8]

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position as minorities for the purposes of the holdings in *Hunter* and *Seattle*.

[8] Two of petitioners' counsel have authored a law review article that acknowledges "a court would have a very hard time invalidating the CCRI [Proposition 209] under the conventional equal protection doctrines concerning facial discrimination or illicit motive." Amar & Caminker, *Equal Protection, Unequal Burdens, and The CCRI*, 23 Hastings Const. L.Q. 1019, 1024

The Ninth Circuit next rejected the applicability of a less familiar type of Equal Protection analysis based on *Hunter* and *Seattle*.

In *Hunter*, the voters adopted a city charter amendment that both repealed an existing city council ordinance prohibiting racial discrimination in housing and required any future ordinances of this type to be confirmed by a popular vote. Thus, the focus and effect of the charter amendment was to burden the enactment of legislation designed to *prevent* discrimination in housing, thereby disadvantaging minority groups who would presumptively benefit from such legislation. In *Seattle*, the challenged enactment, Initiative 350, was designed to restrict school desegregation. The enactment eliminated non-preferential actions previously adopted by the Seattle school board to overcome the effects of historical racial housing patterns, and removed authority of local school boards to adopt desegregation plans in the future. Thus, the challenged enactment had a "racial focus" directed at preventing integration of a school system affected by de facto segregation. De facto segregation is disadvantageous to minority students even if it does not violate the Equal Protection Clause.[9] *See e.g., Jackson v. Pasadena School Dist.*, 59 Cal.2d 876, 880-882, 31 Cal. Rptr. 606, 608-610 (1963) (citing discussion in *Brown v. Board of Education*, 347 U.S. 483, 493-495 (1954)). Thus, both *Hunter*

(1996). Rather, they contend the measure is "vulnerable to attack under a less familiar and more nuanced branch of the equal protection doctrine. . . . " *Id.*

[9] Initiative 350 did not affect voluntary participation in magnet schools and did not prohibit preferences based upon race. *See Seattle School Dist. No. 1 v. State*, 473 F. Supp. 996, 1013-1014 (W.D. Wash. 1979) (quoting terms of Initiative 350).

and *Seattle* dealt with enactments that burdened measures which ensured equal treatment to persons seeking housing and students obtaining a basic education.

More specifically, in *Seattle*, the elimination of the school district's desegregation plan and the erection of a barrier to the enactment of such plans in the future burdened the ability of minority racial groups to pursue legislation that would directly provide students with an integrated learning environment. Such measures, adopted to achieve integration, did not require preferential treatment, but equal treatment. Nor did the mandatory assignment of students in the desegregation plan barred by Initiative 350 burden the individual rights of the non-minority students to compete for educational opportunities or give minority students a competitive advantage. *See University of California v. Bakke*, 438 U.S. 265, 300 (1978) (Opinion of Powell, J.) ("The school desegregation cases are inapposite"); *see also id.* at 300 n.39; *United States v. Paradise*, 480 U.S. 149, 187 n.2 (1987) (Powell, J., concurring); *cf., Associated General Contractors of California v. San Francisco Unified School District*, 616 F.2d 1381, 1386-1388, 1389 n.13. (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980).[10] In *Hunter*, the anti-discrimination ordinances involved no separate competing right because there is clearly no constitutionally protected right to discriminate on the basis of race in private housing sales or leases. *Cf., e.g., Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *Reitman v. Mulkey*, 387 U.S. 369 (1967).

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[10] In *Swann v. Board of Education*, 402 U.S. 1, 16 (1971), this Court noted that the broad discretion of school authorities authorized voluntary integration efforts through assignment of students based on race, even in the absence of a constitutional violation.

In stark contrast to the measures involved in *Seattle* and *Hunter*, Proposition 209 eliminates only the ability of anyone and everyone to pursue government action which provides a preference on the basis of race or gender in areas of government where persons are competing for limited benefits or resources. The petitioners do not seek protection from a measure that impedes state action aimed at expressly preventing discrimination, but rather they assert a right to pursue legislation that *explicitly discriminates against persons on the basis of race and gender.* Such legislation, however, would cause injury to members of the non-preferred racial classes and males, which is a countervailing interest of constitutional dimension. *Adarand*, 515 U.S. at 290; *cf., Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). To conclude that the practical effect of Proposition 209 is to single out minority groups, is to accept the theory of "benign discrimination" which has been rejected by this Court. *Adarand* 515 U.S. at 226-229; *cf., Mississippi University for Women v. Hogan* 458 U.S. at 723-724.

However, petitioners contend that the *unequal* treatment implicit in Proposition 209 is that legislation granting race and gender preferences is singled out for regulation at the constitutional level while other preferences could be the subject of regulation at various levels of government. The flaw in the argument is its premise that "preferences" are a field of legislation. "Preference" is not a discrete subject of legislation, but a system that provides for unequal classes with respect to a particular subject of legislation.

Proposition 209 recognizes that preferences are a form of discrimination because, as the court of appeals noted, "[w]hen the government prefers individuals on

account of their race or gender, it correspondingly disadvantages individuals who fortuitously belong to another race or to the other gender." *Coalition For Economic Equity v. Wilson*, 110 F.3d at 1439; *see also Adarand*, 515 U.S. at 229-230. Preferential treatment based on race must be justified by a compelling state interest, and narrowly tailored. *Adarand*, 515 U.S. at 235. A classification based on gender must be supported by an "exceedingly persuasive justification." *United States v. Virginia*, ___ U.S. ___, 116 S.Ct. 2264, 2274 (1996); *Mississippi University for Women v. Hogan*, 458 U.S. at 724. Thus, both race and gender preferences are subject to a burden that other classifications are not. It is, therefore, illogical to compare race or gender preferences to preferences in other areas of legislation.

The flaw in the argument that Proposition 209 singles out minorities and women for disadvantaged treatment is revealed in the Amar and Caminker law review article that petitioners contend supports their claim. In discussing the "Racial in Character" test set forth in *Hunter* the authors note:

> By contrast, a racial classification in the *Hunter* sense does not trigger strict scrutiny unless the classification is the basis for the imposition of a special political process burden on racial minorities. This must be so, or else antidiscrimination laws such as Title VII that (like the Akron charter amendment) employ the concept of "race" would themselves be constitutionally suspect.

Amar & Caminker, *Equal Protection, Unequal Burdens, and the CCRI*, 23 Hastings Const. L.Q. 1019, 1029 (1996). Proposition 209, like Title VII, is an antidiscrimination law. It does not impose any political burden on minorities and women other than the "burden" of nondiscrimination. That is not a "special political process burden."

B. Political Structure Analysis

The court of appeals also properly rejected the claim that Proposition 209 allocates or "restructures" government power to curtail the operation of those political processes ordinarily to be relied upon to protect a racial group. *See Seattle*, 458 at 485-486; *see also Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527, 546 (1982) (Blackmun, J., concurring). In *Hunter* and *Seattle*, racial minorities were held to be burdened by the imposition of additional and unusual requirements upon the existing governmental process that negatively impacted their ability to use the political process to protect themselves against discrimination.

In *Hunter*, for example, the city charter amendment imposed an automatic referendum applicable only to antidiscrimination measures, a substantial departure from the normal way of enacting local housing legislation, which otherwise remained unaffected. 393 U.S. at 390. Under the measure invalidated in *Seattle*, local school boards retained the authority to adopt student assignment policies on virtually every basis *except* with respect to mandatory busing for the purpose of achieving integration, which would have required a statewide vote. 458 U.S. at 462-463. Again, the invalidated measure skewed the political decision-making process to leave the school boards with complete discretion as to student assignments except to deny them any discretion as to student assignments on the basis of race. In the Court's view, both of these circumstances represented a manipulation of the political or decision-making process on racial grounds to the peculiar disadvantage of minority interests.

Proposition 209, on the other hand, has changed the substantive rights of all Californians generally, by guaranteeing equal opportunity in public education, employment, and contracting. California's policy on the issue of racial and gender equality is a matter of state constitutional, as well as federal constitutional law. *See* Cal. Const. art. I, §§ 7, 8.[11] The historical background of the enactment of Proposition 209 demonstrates that Proposition 209 established a new state constitutional policy with respect to discrimination in the form of race- and gender-based preferences.

In 1980, the California Supreme Court refused to invalidate a county's race-preferential affirmative action program. *Price v. Civil Service Commission*, 26 Cal. 3d 257, 161 Cal. Rptr. 475. The California court declined to construe the state constitution's equal protection clause to provide greater protection against injury from race-preferential programs than the Equal Protection Clause of the Fourteenth Amendment. 26 Cal.3d at 284-285, 161 Cal. Rptr. at 492-493. A year later, in *DeRonde v. Regents of the University of California*, 28 Cal. 3d 875, 172 Cal. Rptr. 677 (1981) *cert. denied* 454 U.S. 832 (1981), the California Supreme Court similarly upheld a race-preferential admissions program of the University of California, Davis, Law School against an equal protection challenge.

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[11] The Supreme Court of California may interpret California's constitutional guarantee of equal protection differently from this Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment. Cal. Const. art. I, § 24. It has, for example, ruled that the California Constitution's equal protection clause provides greater protection against gender-based discrimination than does its counterpart in the federal constitution. *See Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 15-20, 95 Cal. Rptr. 329, 338-342 (1971).

Justice Mosk vigorously dissented in both cases. *See Price*, 26 Cal. 3d at 286-300, 161 Cal. Rptr. at 493-502; *DeRonde*, 28 Cal. 3d at 891-907, 172 Cal. Rptr. at 686-696. He asserted that all racial preferences violate the principle of equal protection:

> If affirmative action means preparation and training for the underprivileged so that they may have the skills to compete on a basis of equality, then it is an essential program. But if affirmative action is interpreted as justifying preferences in the actual competition for society's benefits, then it is undemocratic and violative of the *equal* protection clauses of the federal and state Constitutions.

Price, 26 Cal. 3d at 288 n.2, 161 Cal. Rptr. at 495 n.2. (emphasis in original). Past and present members of this Court have expressed similar views. *See, e.g., DeFunis v. Odegaard*, 416 U.S. 312, 336-337 (1974) (Douglas, J., dissenting); *Croson*, 488 U.S. at 520-528 (Scalia, J., concurring).

In enacting Proposition 209 in 1996, the people of California amended the state constitution to adopt a policy of racial and gender neutrality that the California Supreme Court had rejected in *Price* and *DeRonde* as a matter of state constitutional interpretation. This Court has refused to "interpret the Fourteenth Amendment to require the people of a state to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people." *Crawford v. Board of Education*, 458 U.S. 527, 540 (1982). Accordingly, a constitutional amendment changing the policy of the state on racial and gender preferences is not a restructuring of the decision-making process.

Moreover, there is nothing unique, peculiar or skewed about a state-wide policy on discrimination. The

protection of individual rights is clearly an appropriate subject for a state constitution. Discrimination and unequal treatment by public entities in the areas of contracting, education, and employment should not be a local option. "[I]ndividuals who were unable to vote for the *local* representatives who enacted a race-conscious program may nonetheless feel the effects of that program." *Adarand*, 515 U.S. at 252 (Stevens, J., dissenting) (emphasis added). The State, acting through its constitution or by legislation adopting a policy of statewide interest, has the power to determine at the state level the scope or permissibility of race or gender preferences in affirmative action programs for all entities of government. In this regard, the State has itself "preempted" local law in the field of housing and employment discrimination. *See* Cal. Gov't Code § 12993(c); *Delaney v. Superior Fast Freight*, 14 Cal. App. 4th 590, 596-598, 18 Cal. Rptr. 2d 33, 36-38 (1993). The State has, in addition, determined that the breadth of participation in public contracting is a matter of state-wide interest. *See Domar Electric, Inc. v. City of Los Angeles*, 41 Cal. App. 4th 810, 821, 48 Cal. Rptr. 2d 822, 829 (1995) (Cal. Public Contract Code § 2000, regulating minority and women business enterprise requirements for *local* public works contracts preempts inconsistent city charter provisions because the subject is a matter of state-wide concern). In *Seattle*, the majority of this Court expressly disavowed any intent to create a "vested constitutional right to local decision-making." 458 U.S. at 480 n.23.

The Ninth Circuit correctly determined that this Court's decision in *Crawford* was applicable to the enactment of Proposition 209. There, the Court held that a state constitutional provision may properly address even a race-related matter in a neutral fashion. In *Crawford*, the

Court reviewed an amendment to the California Constitution that prohibited state courts from mandating pupil assignment or transportation except to remedy a specific equal protection violation. 458 U.S. at 529. *Crawford* noted that "the Equal Protection Clause is not violated by the mere *repeal of race-related* legislation or *policies* that were not required by the Federal Constitution in the first place." *Id.* at 538 (emphasis added.). That is exactly what Proposition 209 does – it repeals the policy established by the California Supreme Court in *Price* and *DeRonde*.

In sum, neither *Seattle* nor *Hunter* addressed the issue of *preferential* treatment. "The Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to *full* participation in the political life of the community." *Seattle*, 458 U.S. at 467 (emphasis added). It does not provide them a *superior* right of participation. No decision of this Court has held that the Equal Protection Clause guarantees anyone a *right* to pursue legislation and administrative action that discriminates against others on the basis of race or gender or precludes a state constitution from prohibiting such discrimination. The court of appeals' decision is neither controlled by, nor contrary to, the precedent of *Seattle* or *Hunter*. There is no need for this Court to consider the applicability of those cases to the court of appeals' decision in this case.

3. This Court's Decision in *Romer v. Evans* is Not Applicable to this Case.

For similar reasons, the court of appeal's decision does not stand in conflict with this Court's decision in *Romer v. Evans*, ___U.S.___, 116 S.Ct. 1620, 1627-1629 (1996). In *Romer*, the Court held that the Equal Protection Clause prohibited a state from singling out a certain group of citizens based on sexual orientation. *Id.* at

1626-1627. There, the group members were held to have been denied protection from discrimination because the state enactment precluded the use of the political process to achieve passage of *any* law that protected them from discrimination. *Id.* at 1625-1627. The Court held that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek the aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 1628.

The *Romer* decision is clearly inapposite. In the case at bar, no group of persons is singled out for *disadvantageous* treatment. All races and both genders are treated equally by the prohibition against all forms of discrimination, including the adoption of preferences, and everyone has the same opportunity to seek the same legislation of interest to any group. In *Romer*, as in *Hunter*, the state restriction at issue adversely affected the ability of minority groups to promote legislation that would *prevent* discrimination against that class of persons. In the case at bar, the challenged restriction limits only plaintiffs' right to promote legislation that inherently, explicitly, and by design, discriminates against other persons on the basis of race or gender. The Ninth Circuit pointed out the obvious difference between this case and *Seattle* and *Hunter* and *Romer* as well:

> Plaintiffs challenge Proposition 209 not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment. The controlling words, we must remember, are "equal" and "protection." Impediments to preferential treatment do not deny equal protection.

Coalition For Economic Equity v. Wilson, 110 F.3d at 1445. Accordingly, Proposition 209 does not violate the Equal Protection Clause and the Ninth Circuit decision is not in

conflict with *Romer* or any other decision of this Court. *Romer* provides no reason for this Court to grant certiorari.

4. Since Proposition 209 is Consistent with the Purposes of Title VII, There is No Reason to "Clarify" Whether It is Preempted by Title VII.

Petitioners contend that this Court should grant certiorari to "clarify" whether Proposition 209 "impede[s] Title VII's national policy of encouraging state and local governments voluntarily to remedy their own past discrimination."[12] Petition at 27. There is no need to "clarify" whether Proposition 209 is preempted in its entirety by Title VII because it clearly is not. There are two defects in petitioners' contention. First, it is premised on the erroneous view that a statute creates a national policy, rather than reflecting and thus implementing a national policy. Second, Proposition 209 does not prevent voluntary action by government agencies to remedy their own past discrimination. It simply precludes a "remedy" which discriminates against innocent parties.

In enacting Title VII, "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The language of Title VII itself, namely, section 708 of Title VII, 42 U.S.C. § 2000e-7, expressly states the intent of Congress to preserve laws that do not require or permit employment practices that violate Title VII. Section 708 provides as follows:

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[12] Unlike their assertions regarding the Equal Protection Clause, petitioners do not contend Title VII mandates racial or gender preferences to be initiated by a public employer. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (Title VII does not require preferences for minorities or women).

> *Nothing* in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or *future law* of any State or political subdivision of a State, other than any such law which purports *to require or permit the doing of any act which would be an unlawful employment practice* under this title.

78 Stat. 262 (codified at 42 U.S.C. § 2000e-7) (emphases added). Section 1104 of Title XI, which is *generally* applicable to all of the Civil Rights Act, provides:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State Laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is *inconsistent* with any of the purposes of this Act, or any provision thereof.

78 Stat. 268 (codified at 42 U.S.C. § 2000h-4) (emphasis added).

In determining whether a state law is preempted by federal law and therefore invalid under the Supremacy Clause, the court's "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 280 (1987) (Marshall, J. plurality). "[P]re-emption is not to be lightly presumed." *Id.* at 281. Preemption will be found only if that was the clear and manifest purpose of Congress. *Guerra*, 479 U.S. at 288; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Because it was never the purpose of Congress to preempt a state law prohibiting race and gender preferences in employment, it is clear that Proposition 209 is not preempted by a so-called "national policy."

Indeed, the "policy," expressed in the congressional history of Title VII, is an intent to preserve (1) employers' managerial discretion in hiring and promotion of employees free from interference from *federal regulation*, and (2) the discretion of States to enact their own laws preventing discrimination in employment on the basis of race and gender. With respect to Title VII, "Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law." *Guerra*, 479 U.S. at 281. That intent is found in Section 708 of Title VII and section 1104 of Title XI. In view of these two sections, the plurality of four justices in *Guerra* held that "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of Title VII" because sections 708 and 1104 "provide a 'reliable indicium of congressional intent with respect to state authority' to regulate employment practices." *Id.* at 282. "Sections 708 and 1104 severely limit Title VII's pre-emptive effect." *Id.* "The narrow scope of pre-emption available under §§ 708 and 1104 reflects the importance Congress attached to state antidiscrimination laws in achieving Title VII's goal of equal employment opportunity." *Id.* at 282-283.[13]

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[13] Justice Marshall authored the opinion of the Court in *Guerra*. Three other justices concurred in Part III A (479 U.S. at 280-284) which discusses the preemptive scope of Title VII. Justice Scalia, in concurring in the judgment, concluded that both section 708 and section 1104 are anti-preemption provisions and that section 708 narrows the scope of Title VII to limit its preemptive effect to "laws which purpor[t] to require or permit the doing of any act which would be an unlawful employment practice" under the title. 479 U.S. at 295-296 (Scalia, concurring (quoting section 708)). Justice Stevens, in his concurring opinion, declined to concur in Part III A of the lead opinion because he was not sure whether Justice Marshall had concluded that section 1104 was applicable to Title VII or

Accordingly, both sections 708 and 1104 reflect the congressional purpose to preserve state anti-discrimination laws and to invalidate only laws that are "inconsistent" with Title VII. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103, n.24 (1983); *see also Guerra*, 479 U.S. at 282, n.12 (discussing legislative history of section 1104). Thus, state laws may prohibit employment practices that are permissible under Title VII. *See Shaw v. Delta Airlines, Inc.*, 463 U.S. at 103 ("Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit."). Congress clearly intended to not interfere with state laws unless they actually conflict with Title VII.

Proposition 209 does not conflict with Title VII. Prohibiting an employer from granting a preference on the basis of race or gender, does not violate any provision of Title VII. Title VII demands equality of treatment, but "does not demand that an employer give preferential treatment to minorities or women." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981); *see also Johnson v. Transportation Agency*, 480 U.S. at 644 (1987) (Stevens, J., concurring) ("It remains clear that the Act does not *require* any employer to grant preferential treatment on the basis of race or gender, but since 1978 the Court has unambiguously interpreted the statute to *permit* the voluntary adoption of special programs to benefit members of minority groups for whose protection the statute was enacted.") (emphasis in original).

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whether section 708, as Justice Scalia suggested, "is the only provision governing Title VII's pre-emptive scope." *Id.* at 292 n.1. Justice Stevens admitted that Justice Scalia's analysis of the issue "may be correct." *Id.*

Petitioners nevertheless contend that this Court should grant certiorari to consider whether Proposition 209 is preempted because it is an obstacle to the purposes of Title VII. Petition at 27-30. A state law is preempted when it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the federal statute. *International Paper Co. v. Ouellette*, 479 U.S. 481, 491-492 (1987). The fact that Proposition 209 prohibits race-preferential and gender-preferential employment programs by public employers and that Title VII does not prohibit them does not establish preemption under the "obstacle" theory of conflict. As noted above, for a state law to be an "obstacle" to the purposes of Title VII, it would have to be inconsistent with purpose of the measure. *Guerra*, 479 U.S. at 281. The purpose of Title VII is the achievement of "equality of employment opportunity." *Griggs v. Duke Power Co.*, 401 U.S. at 429-431.

To be sure, this Court has held that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII. *Local No. 93 Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 515 (1986); *United Steelworkers of America v. Weber*, 443 U.S. at 204; *accord Johnson v. Transportation Agency*, 480 U.S. at 629-631, 630 n.8. However, "voluntary compliance" does not equate to race preferential or gender programs. It includes any number of actions that eliminate "'employment practices and systems which constitute barriers to equal employment opportunity.' " *Local No. 93 Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 515-516 (quoting 29 C.F.R. § 1608.1 (b) (1985)). It also "*may* include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination." *Id.* at 516 (emphasis added). This Court has never stated that race-preferential

or gender-preferential programs are necessary rather than simply "appropriate" to achieve the purposes of, and be consistent with Title VII. *Cf. e.g., id.* at 517-518; *Johnson v. Transportation Agency,* 480 U.S. at 639-640. "Congress was not legislating about preferential treatment or quotas in employment because it believed that the problems raised by these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves." *Local No. 93 Int'l Ass'n of Firefighters v. Cleveland,* 478 U.S. at 520 (quoting 110 Congressional Record 15893 (1964) (remarks of Rep. MacGregor) (internal quotations omitted)); *United Steelworkers of America v. Weber,* 443 U.S. at 207-208, n.7; *see also Hazelwood School District v. United States,* 433 U.S. 299, 309 (1977).

When Title VII was enacted Congress was particularly concerned to avoid undue *federal* interference with managerial discretion of employers. "The conclusion in *Weber* that 'Congress chose not to forbid all voluntary race-conscious affirmative action' when it enacted Title VII was largely based upon the legislative history, which shows that Congress was particularly concerned to avoid *undue federal influence* with managerial discretion." *Local No. 93 Int'l Ass'n of Firefighters v. Cleveland,* 478 U.S. at 519 (quoting *United Steelworkers of America v. Weber,* 443 U.S. at 205-207) (emphasis added). Therefore the passage of Title VII was obtained on the assurance that under Title VII "management prerogatives . . . are to be left undisturbed to the greatest extent possible." *Id.* at 520. But the assurance related to protection of those prerogatives from federal laws like Title VII, not from state laws.[14] Indeed,

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[14] Congress was aware that numerous states had anti-discrimination laws already in place when Title VII was

those opposed to Title VII were fearful of federal regulators interfering with local matters. *See United Steelworkers of America v. Weber*, 443 U.S. at 206; *see also* Vass, *Title VII, Legislative History*, 7 Boston College Industrial Commercial Law Review 431, 449-451.

Nor do the EEOC Guidelines interpreting Title VII demonstrate a policy of federal interference with state governmental decisions. In 29 C.F.R. § 1608, the EEOC sets forth guidelines for employers to use in adopting voluntary affirmative action programs. The express purpose of these guidelines is not to analyze the relationship of Title VII to state laws, but to provide employers that wish to use affirmative action an official interpretation under section 713 of Title VII, 42 U.S.C. § 2000e-12, in order to protect them from violating Title VII by "reverse discrimination" against non-minority applicants and employees. 29 C.F.R. § 1608.1.[15]

The Guidelines conclude that it was the intent of Congress that voluntary compliance with Title VII by employers is to be encouraged. 29 C.F.R. § 1608.1 (b) and (c). However, the Guidelines do not equate voluntary

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enacted. *See, e.g.*, 110 Congressional Record 6548, 6550 (1964) (remarks of Senator Humphrey); 110 Congressional Record 7205 (1964) (remarks of Senator Clark); 110 Congressional Record 13089 (1964) (remarks of Senator Saltonstall). Congress knew those existing state laws regulated the "management prerogatives" of employers in the states in which they were in effect.

[15] "Title VII must be construed to permit such voluntary action, and those taking such action should be afforded the protection *against Title VII liability* which the Commission is authorized to provide under section 713(b)(1)." 29 C.F.R. § 1608.1(c) (emphasis added).

compliance solely with race-preferential and gender-preferential programs. Indeed, they provide for many "affirmative" actions that do not involve preferences. *See* 29 C.F.R. § 1608.4; 29 C.F.R. § 1607.17.

Moreover, the Guidelines do not purport to address the issue of preemption of state laws. They represent the EEOC's interpretation of permissible affirmative action methods. Indeed,"[w]here an affirmative action . . . program does not exist, . . . these Guidelines are inapplicable." 29 C.F.R. § 1608.11 (b). Accordingly, the fact that the EEOC has interpreted Title VII to encourage voluntary action "to correct the effects of past discrimination and to prevent present and future discrimination," 29 C.F.R. § 1608.1 (c), does not demonstrate that a state prohibition of preferential programs is inconsistent with, or stands as an obstacle to, the purpose of Title VII to achieve equal employment opportunities by prohibiting discrimination in employment while leaving the issue of preferential treatment and quotas to state and local governments and employers.

In sum, Congress in enacting Title VII expressed an intent to remain "neutral" on the issue of preferences based upon race and gender, leaving that to state or local governments. In this case, California embraced a rule for public entities of equality of treatment in employment decisions regardless of race or gender. That rule neither conflicts with the letter or purpose of Title VII. Therefore, the court of appeals correctly found that Proposition 209 is not preempted. There is no "national policy" of Title VII that Proposition 209 "impedes." There is no reason to grant certiorari.

CONCLUSION

For the foregoing reasons, state respondents respectfully urge this Court to deny the petition for certiorari.

Dated: September 29, 1997.

Respectfully submitted,

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Appendix A

Legislative Analyst Ballot Analysis, Proposition 209 ..... 1a

[LOGO] **Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities. Initiative Constitutional Amendment.**

Official Title and Summary Prepared by the Attorney General

PROHIBITION AGAINST DISCRIMINATION OR PREFERENTIAL TREATMENT BY STATE AND OTHER PUBLIC ENTITIES. INITIATIVE CONSTITUTIONAL AMENDMENT.

- Prohibits the state, local governments, districts, public universities, colleges, and schools, and other government instrumentalities from discriminating against or giving preferential treatment to any individual or group in public employment, public education, or public contracting on the basis of race, sex, color, ethnicity, or national origin.
- Does not prohibit reasonably necessary, bona fide qualifications based on sex and actions necessary for receipt of federal funds.
- Mandates enforcement to extent permitted by federal law.
- Requires uniform remedies for violations. Provides for severability of provisions if invalid.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- The measure could affect state and local programs that currently cost well in excess of $125 million annually.
- Actual savings to the state and local governments would depend on various factors (such as future court

decisions and implementation actions by government entities).

Analysis by the Legislative Analyst

BACKGROUND

The federal, state, and local governments run many programs intended to increase opportunities for various groups – including women and racial and ethnic minority groups. These programs are commonly called "affirmative action" programs. For example, state law identifies specific goals for the participation of women-owned and minority-owned companies on work involved with state contracts. State departments are expected, but not required, to meet these goals, which include that at least 15 percent of the value of contract work should be done by minority-owned companies and at least 5 percent should be done by women-owned companies. The law requires departments, however, to reject bids from companies that have not made sufficient "good faith efforts" to meet these goals.

Other examples of affirmative action programs include:

- Public college and university programs such as scholarship, tutoring, and outreach that are targeted toward minority or women students.
- Goals and timetables to encourage the hiring of members of "underrepresented" groups for state government jobs.
- State and local programs required by the federal government as a condition of receiving federal funds (such as requirements for minority-owned

business participation in state highway construction projects funded in part with federal money).

PROPOSAL

This measure would eliminate state and local government affirmative action programs in the areas of public employment, public education, and public contracting to the extent these programs involve "preferential treatment" based on race, sex, color, ethnicity, or national origin. The specific programs affected by the measure, however, would depend on such factors as (1) court rulings on what types of activities are considered "preferential treatment" and (2) whether federal law requires the continuation of certain programs.

The measure provides exceptions to the ban on preferential treatment when necessary for any of the following reasons:

- To keep the state or local governments eligible to receive money from the federal government.
- To comply with a court order in force as of the effective date of this measure (the day after the election).
- To comply with federal law or the United States Constitution.
- To meet privacy and other considerations based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

FISCAL EFFECT

If this measure is approved by the voters, it could affect a variety of state and local programs. These are discussed in more detail below.

Public Employment and Contracting

The measure would eliminate affirmative action programs used to increase hiring and promotion opportunities for state or local government jobs, where sex, race, or ethnicity are preferential factors in hiring, promotion, training, or recruitment decisions. In addition, the measure would eliminate programs that give preference to women-owned or minority-owned companies on public contracts. Contracts affected by the measure would include contracts for construction projects, purchases of computer equipment, and the hiring of consultants. These prohibitions would not apply to those government agencies that receive money under federal programs that require such affirmative action.

The elimination of these programs would result in savings to the state and local governments. These savings would occur for two reasons. First, government agencies no longer would incur costs to administer the programs. Second, the prices paid on some government contracts would decrease. This would happen because bidders on contracts no longer would need to show "good faith efforts" to use minority-owned or women-owned subcontractors. Thus, state and local governments would save money to the extent they otherwise would have rejected a low bidder – because the bidder did not make a

"good faith effort" – and awarded the contract to a higher bidder.

Based on available information, we estimate that the measure would result in savings in employment and contracting programs that could total tens of millions of dollars each year.

Public Schools and Community Colleges

The measure also could affect funding for public schools (kindergarten through grade 12) and community college programs. For instance, the measure could eliminate, or cause fundamental changes to, *voluntary* desegregation programs run by school districts. (It would not, however, affect *court-ordered* desegregation programs.) Examples of desegregation spending that could be affected by the measure include the special funding given to (1) "magnet" schools (in those cases where race or ethnicity are preferential factors in the admission of students to the schools) and (2) designated "racially isolated minority schools" that are located in areas with high proportions of racial or ethnic minorities. We estimate that up to $60 million of state and local funds spent each year on voluntary desegregation programs may be affected by the measure.

In addition, the measure would affect a variety of public school and community college programs such as counseling, tutoring, outreach, student financial aid, and financial aid to selected school districts in those cases where the programs provide preferences to individuals or schools based on race, sex, ethnicity, or national origin.

Funds spent on these programs total at least $15 million each year.

Thus, the measure could affect up to $75 million in state spending in public schools and community colleges.

The State Constitution requires the state to spend a certain amount each year on public schools and community colleges. As a result, under most situations, the Constitution would require that funds that cannot be spent on programs because of this measure instead would have to be spent for *other* public school and community college programs.

University of California and California State University

The measure would affect admissions and other programs at the state's public universities. For example, the California State University (CSU) uses race and ethnicity as factors in some of its admissions decisions. If this initiative is passed by the voters, it could no longer do so. In 1995, the regents of the University of California (UC) changed the UC's admissions policies, effective for the 1997-98 academic year, to eliminate all consideration of race or ethnicity. Passage of this initiative by the voters might require the UC to implement its new admissions policies somewhat sooner.

Both university systems also run a variety of assistance programs for students, faculty, and staff that are targeted to individuals based on sex, race, or ethnicity. These include programs such as outreach, counseling, tutoring, and financial aid. The two systems spend over

$50 million each year on programs that probably would be affected by passage of this measure.

Summary

As described above, this measure could affect state and local programs that currently cost well in excess of $125 million annually. The actual amount of this spending that might be saved as a result of this measure could be considerably less, for various reasons:

- The amount of spending affected by this measure could be less depending on (1) court rulings on what types of activities are considered "preferential treatment" and (2) whether federal law requires continuation of certain programs.
- In most cases, any funds that could not be spent for existing programs in public schools and community colleges would have to be spent on other programs in the schools and colleges.
- In addition, the amount affected as a result of *this* measure would be less if any existing affirmative action programs were declared unconstitutional under the United States Constitution. For example, five state affirmative action programs are currently the subject of a lawsuit. If any of these programs are found to be unlawful, then the state could no longer spend money on them – regardless of whether this measure is in effect.
- Finally, some programs we have identified as being affected might be changed to use factors other than those prohibited by the measure. For example, a high school outreach program operated by the UC or the CSU that currently uses a factor such as ethnicity to target spending could

be changed to target instead high schools with low percentages of UC or CSU applications.

For the text of Proposition 209 see page 94

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(5)

No. 97-369

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

COALITION FOR ECONOMIC EQUITY, et al.,

Petitioners,

v.

PETE WILSON, Governor of the State of California, in his official capacity, et al.,

Respondents,

and

CALIFORNIANS AGAINST DISCRIMINATION AND PREFERENCES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Under *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School District, No. 1*, 458 U.S. 457 (1982), does the Fourteenth Amendment's prohibition of racial and gender-based discrimination by states prevent states from prohibiting racial and gender-based discrimination?

2. Do "minorities" and women have a unique equal protection right, enjoyed by no others, to veto state measures mandating nondiscrimination for others and to seek enactment of local measures mandating discrimination against others?

3. Does *Romer v. Evans*, 116 S. Ct. 1620 (1996), prohibit states from granting nonminorities and men the same protection from discrimination granted to minorities and women?

4. Does Title VII preempt laws that are consistent with its substantive commands and that promote the policies of nondiscrimination that it embodies solely because they are enacted at the state, rather than local, level?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Californians Against Discrimination and Preferences, Inc., certifies that it has no parent company, non-wholly owned subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT OF THE CASE

On November 5, 1996, the people of California reaffirmed their commitment to the principles of racial equality and nondiscrimination by ratifying Proposition 209, which is now Article I, Section 31 of the California Constitution. The measure provides in relevant part that:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Despite the obvious symmetry between Proposition 209 and the Equal Protection Clause, the district court entered a preliminary injunction on the ground that petitioners had demonstrated a probability of success on the merits of their facial challenge to Proposition 209 under the Fourteenth Amendment. As a threshold matter, the court acknowledged that it is clear under *Crawford v. Board of Educ.*, 458 U.S. 527 (1982), that governmental entities may "voluntarily repeal affirmative action policies. . . . " App. B11, App. B45. Nevertheless, the court concluded that, under *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), Proposition 209 violated the Equal Protection Clause. Specifically, the district court held that Proposition 209 embodied a "racial classification," since the amendment "single[d] out an issue of special interest to minorities." App. B46. The court also held that Proposition 209 "nonneutrally reorder[ed] the political process to burden the interests of minorities or women." App. B61. The district court rested its conclusion, in part, on the fact that Proposition 209 eliminated only racial and gender preferences while allowing other groups to seek preferential treatment for veterans, the disabled, athletes, and artists. App. B30, B48.[1]

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[1] The district court also based its grant of a preliminary injunction on the alternative ground that Title VII of the Civil Rights Act of 1964 preempts Proposition 209. The court rejected petitioners' claim that Title

The Ninth Circuit reversed and vacated the district court's preliminary injunction. The court began its analysis by noting the well-established principle that the "standard of review under the Equal Protection Clause does not depend on the race or gender of those burdened or benefited by a particular classification." App. A19 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion)). The court noted that petitioners' claim, when reduced to its essence, was that Proposition 209's "ban on unequal treatment denies members of certain races and one gender equal protection of the laws." App. A19. The court concluded, however, that "[a] law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender" and thus does not violate the Constitution as a matter of "conventional" equal protection analysis. App. A21.

The Ninth Circuit also rejected petitioners' argument that Proposition 209 imposes an unequal "political structure" on women and minorities who seek preferential treatment from the lowest level of government. App. A21. In considering the applicability of *Seattle*, the Ninth Circuit noted that "[t]he *Seattle* majority specifically allayed any concern that its holding rendered the state powerless to address racial issues where localities acted first." App. A32 (citing *Seattle*, 458 U.S. at 480 n.23.). Furthermore, the court held that Proposition 209 does not contain any racial classifications and does not reorder the political structure of state or local government. Instead, the court concluded that Proposition 209 "addresses in neutral-fashion race-related and gender-related matters." App. A33. Finally, the Ninth Circuit observed that

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VI and Title IX preempt Proposition 209. Moreover, the court recognized that there is no actual conflict between Title VII and Proposition 209 and that the federal government has not "occupied the field" in the civil rights area. Nevertheless, the court held that the amendment frustrated Title VII's objectives of encouraging affirmative action. App. B69-B72, App. B75-B77. Accordingly, the court held that Proposition 209 was inconsistent with the goals of Title VII and thus preempted.

" 'it would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it.' " App. A38 (quoting *Crawford*, 458 U.S. at 535).[2]

Petitioners filed a petition for rehearing and suggestion for rehearing *en banc*, which the full Ninth Circuit rejected with four judges dissenting. Subsequently, both the Ninth Circuit and this Court rejected petitioners' motion for a stay of the mandate.

REASONS FOR DENYING THE WRIT

The decision below does not warrant this Court's plenary review under the traditional criteria. No opinion by any federal or state court conflicts with the Ninth Circuit's decision.[3] Moreover, no prohibitions analogous to Proposition 209 have been enacted, much less adjudicated. More generally, while Proposition 209 implicates an important and controversial public policy issue, the Ninth Circuit's affirmance of Proposition 209's constitutionality does not entail any significant *legal* issues or conflict with any decision by this Court, but is simply a straightforward application of bedrock equal protection principles and binding precedent.

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[2] Citing the express preemption provisions of the 1964 Civil Rights Act, the Ninth Circuit also rejected petitioners' contention that Proposition 209 impermissibly interferes with the requirements and purposes of Title VII.

[3] The only federal case which has previously considered the constitutionality of a state law forbidding local affirmative action racial preferences is *Associated Gen. Contractors v. San Francisco Unified School Dist.*, 616 F.2d 1381, 1388 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980), where, in upholding the measure, the Ninth Circuit stressed that it could not so "remove the question from the legislative sphere without grossly overstepping the appropriate limits of the judiciary in the American system." *See also Louisiana Associated Gen. Contractors, Inc. v. State of Louisiana*, 669 So.2d 1185, 1199 (La. 1996) (holding that the state constitution expressly banned all racial discrimination, including minority preference programs, and concluding that "although a state has the authority to participate in race preference programs under the Fourteenth Amendment that same provision does not mandate that it do so").

Proposition 209 simply forbids official conduct discriminating on the basis of race.[4] Paradoxically, petitioners argue that this prohibition facially violates the Fourteenth Amendment, although that Amendment's " 'central purpose . . . is the prevention of official conduct discriminating on the basis of race.' " *Seattle*, 457 U.S. at 484 (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976)). Thus, under petitioners' Orwellian interpretation of this Court's precedent, the federal constitutional provision prohibiting a "State" from racially discriminating prohibits a "State" from ending racial discrimination. U.S. Const. amend. XIV. (No "State". . . .)

To be sure, the Fourteenth Amendment *permits* racial discrimination if the government can affirmatively demonstrate that it is narrowly tailored to achieve a compelling governmental interest. But the Fourteenth Amendment concededly and obviously does "not *require* what it barely permits." App. A38 (emphasis added).[5] Thus, the substantive

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[4] While petitioners challenge application of Proposition 209 even to *state* programs and *gender preferences*, we will focus more directly on their criticism of Proposition 209's effect on local racial preferences, since this is allegedly the most obvious defect.

[5] Although the district court found, App. B62, and petitioners *sometimes* concede, that the Fourteenth Amendment does not *require* racially preferential treatment, petitioners now also seem to be schizophrenically maintaining that there is a "constitutional obligation" to employ racial preferences. *Compare* Pet.16, 24, 25 *with* Pet. 9, 10, 15. But the Constitution most assuredly does not "require what it barely permits" and petitioners can cite *no* support for the extraordinary proposition that any individual has a Fourteenth Amendment *right* to preferential treatment because others of his race have been discriminated against. No Justice has ever suggested as much and every lower court presented with such an argument has rejected it out of hand. *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 379 (1978) (Brennan, J., dissenting) (California University "is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program."); *Austin Black Contractors Ass'n v. City of Austin*, 78 F.3d 185, 186 (5th Cir. 1996) ("we join the numerous other circuits that have previously determined that the Fourteenth Amendment does not require affirmative action"). To be

command of Proposition 209 is fully consistent with the substantive command of the Fourteenth Amendment. Petitioners nevertheless insist that, although racial neutrality fully

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sure, "a city *could* act . . . by taking appropriate measures," including racial preferences, when "necessary to break down patterns of deliberate exclusion." *Croson*, 488 U.S. at 509 (emphasis added). *See also id.* ("Nothing we say today *precludes* a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction.") (emphasis added); *Adarand Constructors v. Pena*, 515 U.S. 200, 237 (1995) ("government is *not disqualified* from acting in response to [racial discrimination].") (emphasis added). It is equally true that "the State . . . has the absolute duty" to remedy its own discrimination. *Croson*, 488 U.S. at 518 (Kennedy, J., concurring). But, as the Ninth Circuit correctly noted, petitioners cannot distort the independent propositions that the State *may* sometimes use racial preferences when "necessary" and *must* correct its intentional discrimination into the very different proposition that the State *must* use racial preferences to correct its prior discrimination. Pet. App. A15 n.7. Rather, such discrimination can be fully remedied by prospectively eliminating the discriminatory policies and, retrospectively, "must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' " *Shaw v. Hunt*, 116 S. Ct. 1894, 1905 (1996) (quoting *Missouri v. Jenkins*, 515 U.S. 70, 98 (1995)). *See also Missouri v. Jenkins*, 515 U.S. 70, 109 (1995) (O'Connor, J., concurring) ("School desegregation remedies are intended, 'as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' ") (quoting *Milliken v. Bradley*, 418 U.S. 717, 746 (1974))). But no court has ever suggested that a *nonvictim* of discrimination has some Fourteenth Amendment right to racially preferential treatment from a local government by virtue of his group membership, regardless of whether a federal court is *permitted* under the Fifth Amendment's equal protection guarantees to order such racial preferences. While the Court has twice held that court-ordered preferences do not *violate* the equal protection restrictions on federal courts, and a state legislative preference would presumably be permissible in the same circumstances, there is absolutely no support (and none is cited), for petitioners' novel suggestion that legislatures have a *duty* to enact such preferences when a court *could* order such a remedy. *See United States v. Paradise*, 480 U.S. 149, 184 (1987); *Local 28 of Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 475 (1986).

complies with the substantive constraints that the Fourteenth Amendment places on the "State," racial neutrality affirmatively violates the substantive constraints of the Fourteenth Amendment if it is enacted by the "State." If, for example, both the State of California and the City of San Francisco enacted precisely the same race-neutral substantive policy, the City's would be constitutionally unobjectionable, but the State's somehow becomes converted into a "racial classification" that unconstitutionally excludes minorities from the political process.

Thus, petitioners' entire case is premised on the extraordinary and unprecedented notion that the Fourteenth Amendment is not just a floor of nondiscrimination below which no state may descend, but is also a ceiling establishing the maximum permissible scope of nondiscrimination above which no state may ascend. Even here, petitioners are forced to concede that, *as a general matter*, state constitutions may grant rights and protections that enhance and go beyond all federal constitutional protections. *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 81 (1980) (A state is entirely free to "exercise its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."). This principle applies to the Fourteenth Amendment's equal protection guarantees just as it does to all other constitutional guarantees. Thus, although the Fourteenth Amendment permits gender-based discrimination which satisfies "intermediate scrutiny," state constitutions may go further and eliminate *all* public gender-based discrimination through Equal Rights Amendments and the like. Similarly, while the Fourteenth Amendment prohibits only *intentional* racial discrimination, states may go further and prohibit conduct having a "disparate impact" along racial lines, just as states were obviously free to voluntarily prohibit local racially-segregated schools at a time when the Fourteenth Amendment permitted such a "separate but equal" regime.

In light of this, how is it possible that California violated the Fourteenth Amendment simply by eliminating the narrow exception for racial discrimination that the Fourteenth Amendment tolerates, but does not require? The petitioners' only response is that while the State is, of course, free to enhance nondiscrimination protections with the effect of primarily benefiting *minorities and women* beyond the Fourteenth Amendment's floor, without either creating a racial classification or denying nonminorities their Fourteenth Amendment right of equal access to the political process, any nondiscrimination enhancement with the effect of benefiting *nonminorities* somehow violates the equal protection rights of minorities and women. Thus, petitioners' position is premised on the facially invalid notion that "minorities" and women have enhanced equal protection rights superior to those of all other "person[s]" protected by the Fourteenth Amendment. Under this view, while nonminorities have no equal protection right to be free of state constitutional amendments enhancing the nondiscrimination rights of others beyond the Fourteenth Amendment's floor, minorities and women alone do have such a right. (Indeed, under this interpretation of the Fourteenth Amendment, minorities and women, unlike nonminorities, have a right to petition for racially preferential discrimination against other citizens.)

It could not be clearer, however, that all persons have the same equal protection rights. *Adarand*, 515 U.S. at 229-30 (" '[T]he standard of review under the Equal Protection clause is not dependent on the race of those burdened or benefited by a particular classification.' ") (quoting *Croson*, 488 U.S. at 494 (plurality opinion)). Thus, since increasing the nondiscrimination protection for minorities and women is neither a racial classification nor subject to heightened scrutiny, this necessarily means that Proposition 209 is not either, since the group purportedly harmed or benefited by a law does not determine the level of Fourteenth Amendment

scrutiny or whether it is a racial classification. And, of course, even if "minorities" did have enhanced rights, this does not avail petitioners because the groups purportedly harmed by Proposition 209 constitute approximately *70%* of California's population.[6] 1990 U.S. Census, 90-PPL-1; *Croson*, 488 U.S. at 495-96.

In short, petitioners' argument necessarily rests on one of two facially meritless propositions: (1) the Fourteenth Amendment *always* prohibits states from enhancing non-discrimination protections above the protections contained in the Fourteenth Amendment itself, or (2) the Fourteenth Amendment permits such enhancement only if it benefits minorities and women, who have a unique equal protection right to prevent state efforts to end discrimination against others (and to lobby for discrimination in their favor). Under this view, of course, the *federal* legislature is disabled from forbidding public discrimination arguably permitted under the Constitution, since the most "remote level of government" possible cannot "shut the door" on minorities and women seeking to lobby San Francisco to enact such "constitutionally

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[6] Contrary to petitioners' assertion, however, the preference laws overturned by Proposition 209 often do discriminate against "protected groups" in petitioners' purported class, such as Asians and "nonminority" women, and sometimes aid white males. For example, the district court acknowledged that Asian "enrollments would *increase* by 15 to 25 percent" at the University of California if a race-neutral admissions policy is adopted. App. B29. Thus, under petitioners' incoherent theory, an Asian or nonminority woman who has been discriminatorily excluded by a racial preference program has his or her equal protection rights violated by Proposition 209's *abolition* of the program discriminating against them. Also, some California agencies set goals and timetables for *whites* in jobs where they are "underrepresented." Ed Mendel, *Affirmative Action Goal: More White Men*, San Diego Union-Tribune, Oct. 16, 1996, at A-1.

permissible" preferences.[7] Needless to say, neither this Court's decision in *Seattle* nor any other coherent constitutional principle supports these propositions.[8]

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[7] Thus, under petitioners' view, in *Taxman v. Board of Educ. of the Township of Piscataway*, 91 F.3d 1547, *cert. granted*, 117 S. Ct. 2506 (1997), the Court is *constitutionally compelled* to interpret Title VII to permit racial preferences to achieve "diversity" if, as petitioners' maintain, such "diversity" is a compelling governmental interest authorizing preferences under the Fourteenth Amendment. Pet. 10 n.7. Moreover, the 1991 Amendments to Title VII prohibiting all "race-norming," even in circumstances where such norming is purportedly necessary to achieve a compelling government interest, is violative of petitioners' view of the Constitution. 42 U.S.C. § 2000e-2. And, of course under this view, Congress, like the State of California, can *never* amend Title VII to end a regime of racial preferences.

[8] In any event, this is not an appropriate case for plenary review because, even if petitioners' legal reasoning is *entirely correct*, the district court's injunction is still impermissibly overbroad and directly contrary to this Court's well-established limits on *facial* challenges to state laws. It is settled that, in a facial challenge, petitioners "*must* establish that *no set of circumstances* exist under which [Proposition 209] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added). This doctrine obtains with particular force to facial challenges to state laws that have not yet been interpreted by state courts. *See Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997). Petitioners and the district court *concede* that Proposition 209 is constitutional in some applications – insofar as it overturns preference programs violative of the Equal Protection Clause – and there is no finding or allegation that *all* (or a substantial majority) of California's extant preference programs satisfy the Fourteenth Amendment. *Cf. Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 895 (1992). Thus, the district court's injunction of *all* applications of Proposition 209 is legal error in a facial challenge and impermissibly overbroad. Similarly, both the district court and the petitioners acknowledge that, under *Crawford v. Board of Educ.*, 458 U.S. 527 (1982), *repeal* of existing preference programs is constitutional, and the only flaw in Proposition 209 is that it "also prohibits the adoption of such programs in the future." App. B57; Pet. 21 n.15. The application of Proposition 209 to *current* preference programs is therefore constitutional and cannot be enjoined or the source of any potential injury to petitioners.

I. The Decision Below Is Fully Consistent With *Seattle* And *Romer* And Compelled by *Crawford*

According to petitioners, *Seattle* grants minorities and women, but only minorities and women, a constitutionally-guaranteed veto power over any substantive decision by the State that does not "inure primarily to [their] benefit," even if the substantive policy is fully consistent with – and indeed furthers – the Fourteenth Amendment's substantive principles. Pet. 18. Any state political decision, petitioners say, to eliminate such preferences or any other state policy that "inure[s] to the benefit of minorities," is, *ipso facto*, a racial classification. Pet. 19. Moreover, because such state policies, like *all* state policies, preempt contrary local laws, any state substantive decision *inherently* burdens the political process by rendering lobbying of local governments futile. Pet. 23-24. Petitioners thus seek to erect a discriminatory, dual political regime: minority groups have a right not only to veto state measures mandating nondiscrimination against others, but also to seek enactment of state and local measures mandating discrimination against others; nonminorities, however, are deprived of a right even to seek state measures legislating an end to discrimination against themselves.[9] Indeed, the law review article co-authored by petitioners' lead counsel, which they have cited repeatedly in their Ninth

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[9] Petitioners now agree it is "preposterous" to argue that minorities and women can veto any state measure that eliminates programs which allegedly inure to their benefit. Reply to CADAP's Opposition to Stay at 7 (filed Sept. 2, 1997 U.S.). They insist that they seek only to preserve minorities' equal political "opportunity" to seek racial preferences from local governments and state bureaucracies. But this "opportunity" is allegedly denied *solely because* the state has made a substantive decision contrary to the desires of racial preference proponents which, like *all* state constitutional (and legislative) provisions, preempts contrary decisions by inferior subdivisions within the state. Since petitioners are therefore asserting that any state decision requiring public bodies to "hurt" minorities denies minorities an "equal opportunity" to lobby inferior governments to "help" minorities, then they most assuredly are making the "preposterous" assertion that minorities and women can veto any state decision that "hurts" them.

Circuit briefs, quite candidly states that, under their interpretation of *Seattle*, minorities must win every "important political battle" at the state level:

> With respect to a given issue that is "racial in character," a state constitution may either remain neutral or prescribe norms *favorable* to racial minorities . . . But a state constitution can never entrench a substantive norm with respect to an issue that is "racial in character" in a direction that *disadvantages* a racial minority. For example, a constitution can *mandate* affirmative action, but it can *never* selectively prohibit it. . . . Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 Hastings Const. L.Q. 1019, 1052 (1996) (emphasis added)

But see Seattle, 458 U.S. at 483.

As the Ninth Circuit correctly recognized, however, *Seattle* did not overturn decades of binding precedent and basic constitutional principles by mandating such uniquely *advantageous* treatment of *substantive* policies allegedly favored by minorities and women – particularly when the policy is violating the presumptive nondiscrimination rights of others. Quite to the contrary, *Seattle* prohibits only "uniquely *disadvantageous* treatment" that would "exclude particular racial groups from effective participation in the political *proces[s]*." *Id.* at 486 & n.30 (emphasis added) (internal citations omitted). Indeed, the *Seattle* opinion *itself* unequivocally rejected not only the precise result petitioners advocate – invalidation of state interference with local racial preferences – but also petitioners' basic analytic premise – that a state is disabled from making the same substantive decision on "racial issues" that local governments can freely make under the Fourteenth Amendment.

1. First, Justice Powell in his dissenting opinion in *Seattle* advanced, in almost identical terms, petitioners' understanding of the majority opinion and the parade of horribles that would necessarily ensue from this "strange" and "alien" principle. 458 U.S. at 495 (Powell, J., dissenting). Just like petitioners, Justice Powell maintained that the majority opinion held that the "heretofore undoubted supreme authority of the State's electorate is to be curtailed whenever a school board – or indeed any other state board or local instrumentality – adopts a race-specific program that arguably benefits racial minorities." *Id.* at 494. Moreover, as if specifically forecasting the adoption of Proposition 209, Justice Powell argued that the majority opinion could be misconstrued to invalidate statewide bans on affirmative action preferences by local agencies:

> After today's decision it is unclear whether the State may set policy in any area of race relations where a local governmental body arguably has done "more" than the Fourteenth Amendment requires. If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene.

Id. at 498 n.14. *See* App. A31-A34. The majority explicitly disagreed, however, explaining that the dissent's interpretation "evidence[s] a basic misunderstanding of our decision. . . . [I]t is evident . . . that *the horribles paraded by the dissent, post*, at [458 U.S. at 499] n.14 – *which have nothing to do with the ability of minorities to participate in the process of self-government – are entirely unrelated to this case*." *Id.* at 480 n.23 (emphasis added). Petitioners nevertheless maintain that *Seattle* directly requires invalidation of a "state's" efforts to "intervene" in prior efforts to distribute "local employment or benefits" on a "racial basis" because such intervention has everything to do with "the ability of minorities to participate in the process of self-government."

Seattle also specifically rejected petitioners' basic submission that "every attempt to address a racial issue [by the state] gives rise to an impermissible racial classification." *Id.* at 485. Even more directly, the Court rejected petitioners' related assertions that they have a vested "constitutional right to local decision-making" on racial issues and that a "State's attempt to repeal a [local racial preference] program creates a racial classification, while 'identical action' by [a local government] does not." *Id.* at 480 n.23, 485 n.29. Petitioners cannot distinguish these dispositive statements by the *Seattle* majority opinion itself.[10]

2. Nor is proposition 209 in any way inconsistent with the general *Hunter/Seattle* test. As applied in *Seattle*, that test invalidates government action that is both (1) a "racial classification" and (2) "structures the *process* of decisionmaking" in a manner that imposes comparative burdens on racial groups. 458 U.S. at 485; *id.* at 480 n.23 (emphasis in original).

With respect to the threshold prong, all agree with the Ninth Circuit that *Seattle* does not reach "state action that

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[10] Petitioners suggest that *Seattle*'s straightforward endorsement of state interference with local racial preferences is actually endorsing such interference *only* if accomplished pursuant to petitioners' new-found methodology, i.e., eliminating racial and gender criteria by specifying all permissible nonracial and nongender-based criteria. Pet. 25. In addition to the fact that petitioners' new-found distinction makes no sense for the reasons set forth below, there is absolutely no language in *Seattle*'s majority or dissenting opinions which in any way supports petitioners' interpretation. Justice Powell did not hypothesize a state eliminating racial preferences without mentioning race, but considered the state's participation in any area of "race relations," including the state directly "intervening" to overturn local racial preferences. When the majority opinion said there was no problem with such state interference, there was no suggestion that the state could interfere with local racial preferences only if it accomplished this indirectly by prescribing a code of acceptable nonracial criteria.

addresses, in neutral fashion, race-related matters." App. A29 (quoting *Crawford*, 458 U.S. at 538). Proposition 209 is unquestionably just such state action, and is not a racial classification. "Rather than classifying individuals by race or gender, Proposition 209 *prohibits* the State from classifying individuals by race or gender." App. A21 (emphasis in original). Unlike the law at issue in *Hunter* and Initiative 350 in *Seattle*, Proposition 209 is not "an impediment to protection against unequal treatment but . . . an impediment to receiving preferential treatment." App. A35.[11] Since Proposition 209 simply outlaws programs that are "presumptively invalid

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[11] For essentially the same reason, *Romer v. Evans*, 116 S. Ct. 1620 (1996), is facially inapposite here. *Romer* struck down Colorado's Amendment 2 because it created political obstructions to equal treatment. App. A34-A25. As with *Seattle*, this prohibition cannot rationally be converted into condemnation of "political obstructions to preferential treatment." App. A35. There is no hint in *Romer* that the Colorado constitution was disabled from invalidating homosexual quotas or preferences by local governments. To the contrary, the Court went out of its way to emphasize that gays and lesbians were not seeking any "special rights." 116 S. Ct. at 1622.

In stark contrast to Amendment 2, Proposition 209 does not deny any group any "protection from discrimination" available to other groups. Pet. 26. To the contrary, petitioners' complaint is that Proposition 209 grants other groups the *same* protection from discrimination that petitioners enjoy – a blanket prohibition on race and gender-based preferences in all circumstances. Thus, petitioners are indeed seeking "special rights": the right to veto, and be exempted from, any statewide effort to forbid local public entities from granting any person a racial advantage, although the state concededly can and has outlawed such advantages for all others. Indeed, it is only the injunction sought by petitioners that would violate *Romer*. For such an injunction would affirmatively prohibit males and "nonminorities" from seeking protection against discrimination by local governments from the state legislature or state constitution, since those are more "remote levels of government." Such an injunction would therefore "make it more difficult for one group of citizens than for all others to seek aid from the government" and would prohibit "government and *each* of its parts [from] remain[ing] open on impartial terms to all who seek its assistance." *Romer*, 116 S. Ct. at 1628, *quoted in* Pet. 26 (emphasis added).

racial classifications," it cannot itself be a "presumptively invalid racial classification." *Crawford*, 458 U.S. at 528.

Petitioners offer two responses to this unanswerable logic. First, under *Seattle*, a state law which prohibits racially preferential treatment is no different than a law which prohibits equal treatment. Both are racial classifications because preference programs, like nondiscrimination laws, "inure primarily to the benefit of racial minorities" and *any* law which eliminates such benefits is a racial classification. Pet. 23 (quoting *Seattle*).[12] Second, *Seattle* holds, albeit silently, that laws which "selectively" prohibit distinctions on the basis of race are racial classifications unless they also prohibit all other classifications on all other bases. Pet. 25. Otherwise, a California citizen seeking preferential admission to a state university on the basis of his skin color is in a worse position than a California citizen seeking preferential admission on the basis of, say, "California residence." App. B48.

If either of these propositions is true, Proposition 209 is most assuredly unconstitutional. But, of course, so is the *current* equal protection clause of the California Constitution and all state Equal Rights Amendments, as well as Title VI and Title VII of the 1964 Civil Rights Acts. All "selectively" condemn racial and gender preferences, but are wholly silent on (or affirmatively authorize) preferences on other bases – thus "denying" minorities and women an equal opportunity to seek race-based preferences from local governments. Petitioners are forced to concede, however, that federal civil rights laws and state Equal Rights Amendments may so "shut the door" on state and local governments using racial or gender preferences in any circumstances, and that state and

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[12] Indeed, according to petitioners, laws requiring racial preferences are constitutionally *superior* to nondiscrimination laws. Thus, while California (as the state legislature has done) may *mandate* that San Francisco adopt (constitutionally permissible) racial preferences without any difficulty under *Seattle*, it may not *forbid* racial preferences because that is an impermissible racial classification under *Seattle*.

local laws may outlaw such preferences by, respectively, state and local governments. They are therefore wholly unable to explain how these permissibly "neutral" prohibitions against only racial and gender preferences can become impermissible "racial classifications" simply because they are embodied in the state constitution, rather than in superior federal law or inferior law within the state.

Moreover, while petitioners confidently proclaim that *Seattle* invalidated state prohibitions on racially preferential treatment, they point to nothing in the opinion which suggests that extraordinary result. To the contrary, the *only* identified evil in the Washington initiative was that it subjected minorities to disparate treatment on the basis of race. The initiative proponents in Washington could not, of course, maintain that they were opposed to racially integrated schools as such, and thus asserted that the initiative was premised on race-neutral opposition to the problem of transporting children beyond their neighborhood school. *Seattle* rejected this explanation, however, solely because the initiative treated racially beneficial integrative busing *worse* than busing for "virtually any other purpose." *Seattle*, 458 U.S. at 471.[13] While the purportedly nonracial problem addressed by Seattle's Initiative 350 was transportation beyond the neighborhood school, this distant transportation became a "problem" only when it benefited minority students seeking an integrated education. Under standard discriminatory treatment analysis, therefore, the *Seattle* Court inferred that Initiative 350 was "effectively drawn for racial purposes" and " 'because of' . . . its adverse effects upon busing for integration," not out of any race-neutral devotion to neighborhood schools. *Id.* at 471 (quoting

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[13] *See id.* at 471 (initiative "carefully tailored to interfere only with desegregation busing"); *id.* at 473-75. *See also Seattle School Dist. v. Washington*, 633 F.2d 1338, 1343-44 (9th Cir. 1980) ("Initiative 350 embodies a constitutionally-suspect classification based on racial criteria because it legislatively differentiates student assignment for purposes of achieving racial balance from student assignment for any other significant reason.")

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979)). *See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (discriminatory purpose may be inferred where "factors usually considered important by the decisionmaker strongly favor decision contrary to the one reached."). While there are legitimate, nonracial justifications for reducing educational funding, if a legislative measure reduced funding *only* for integrated schools, it would clearly be a racial classification. *Seattle* held that denying transportation *only* to integrated schools is also "designed to accord disparate treatment on the basis of racial considerations." *Id.* at 485.[14] Thus, *Seattle* does not hold that states may not eliminate integrative busing because busing is a "racial issue" (a holding impossible to square with *Crawford*), but only that government may not engage in disparate treatment on the basis of race.

Apparently recognizing this, petitioners desperately attempt to suggest that minorities and women in California suffer unequal treatment similar to that visited upon black school children in Washington because Proposition 209 prohibits differential treatment on the basis of race, but not differential treatment on the basis of all other potential criteria. Proposition 209, however, obviously does not treat minorities and women worse than other groups, it simply treats racial discrimination worse than other classifications. As the Ninth Circuit correctly noted, this is obviously not contrary to the Fourteenth Amendment since the *Fourteenth Amendment*

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[14] Moreover, far from suggesting that integrative efforts were analogous to presumptively unconstitutional racial preferences, *Seattle* assumed, because it was wholly uncontested, the "propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation." 458 U.S. at 471 n.15. Incredibly, petitioners seek to twist the Court's acknowledgment of the undisputed "propriety" of integrative busing into an unspoken conclusion that such busing raised constitutional concerns analogous to racial preferences. App. B47; Pet. 23.

itself treats racial preferences differently from all other preferences. As the *Seattle* Court itself repeatedly emphasized, racial discrimination is a "special condition" deserving of special condemnation. 458 U.S. at 486. State and federal governments always have been free to single out racial discrimination for special condemnation, regardless of whether that condemnation is coupled with elimination of inoffensive or beneficial preferences based on "leadership ability . . . California residence . . . educational disadvantage, family income . . . age . . . handicap." App. B28, B48. App. F6.

To be sure, the principal effect of Proposition 209's blanket condemnation of racial discrimination is to eliminate affirmative action preferences. But this is simply a concomitant of the fact that this is virtually the only form of racial discrimination by public entities that is permissible in any circumstance. The fact that the State has chosen to eliminate the one remaining *exception* to its regime of racial neutrality hardly suggests that it is imposing a "*comparative* burden" on minorities or not addressing "in neutral fashion, race-related matters." *Seattle*, 458 U.S. at 485; *Crawford*, 458 U.S. at 538. To the contrary, racial minorities and women are treated precisely the same as all other groups in California. After Proposition 209, no person in California, minority or nonminority, can successfully lobby any government, state or local, for preferences based on their racial group membership or gender. Conversely, all persons in California, minority or nonminority, can successfully lobby any government for preferences based on all other criteria. Notwithstanding this obviously "neutral" treatment of minorities and women, petitioners maintain that they have "selectively" been discriminated against because they are not "selectively" *exempted* from Proposition 209's blanket ban on discrimination and have suffered a "comparative" disadvantage because they, like all other Californians, are *equally* disabled from successfully lobbying local governments for racial preferences. As the Ninth Circuit aptly noted, "[i]f merely stating

this alleged equal protection violation does not suffice to refute it, the central tenet of the Equal Protection Clause teeters on the brink of incoherence." App. A19-A20.

Thus, there is simply nothing to petitioners' bizarre suggestion that laws eliminating racial discrimination must, in contrast to Title VII, *eliminate* "management prerogatives . . . to the greatest extent possible" by "specifying particular admission criteria" for all contracting, employment and education decisions by every unit of California government. *United Steelworkers v. Weber*, 443 U.S. 193, 206 (1979) (internal citations omitted); Pet. 25. We note additionally that engrafting such a bizarre requirement on civil rights laws does not even make sense from *petitioners'* perspective. A statewide ban on *all* preferences, *including* racial and gender preferences, would just as tightly "lock shut" the "breathing space" of local governments to grant racial and gender preferences – the alleged constitutional flaw in Proposition 209. Moreover, depriving a minority woman of the ability to seek preferences on the basis of her "low family income . . . educational disadvantage . . . California residence . . . or handicap" would simply *exacerbate* this "deprivation" and would eliminate a host of preferences that disproportionately *benefit* minorities and women.[15]

3. Finally, this Court's decision in *Crawford* directly refutes petitioners' assertion that state constitutions impose racial classifications whenever they eliminate programs that "inure primarily to the benefit of minorities" unless they also eliminate "analogous" nonracial benefits for other groups.

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[15] Moreover, petitioners elsewhere state that *Romer* prohibits state constitutions from denying *any* group, such as homosexuals, the ability to seek preferences from local government because such preferences constitute part of the "protection from discrimination" that *Romer* said state constitutions could not eliminate. Pet. 27. Thus, petitioners simultaneously assert that (1) to satisfy *Seattle*, state constitutions must bar all potential local preferences for all groups if they eliminate racial preferences and (2) to satisfy *Romer*, state constitutions may not bar any local preferences for any groups.

Crawford upheld the popularly-enacted constitutional amendment, Proposition 1, eliminating the California constitution's *de facto* busing requirement. Since court-ordered *de facto* busing "inures primarily to the benefit of minorities," *Crawford* definitively establishes that petitioners are flatly wrong when they contend that the elimination of such benefits are impermissible racial classifications under the first prong of the *Hunter/Seattle* test. *See also Seattle*, 458 U.S. at 485. Rather, the test is simply whether the state constitution "addresses, in neutral fashion, race-related matters," which Proposition 209 plainly does since its benefits are "made available regardless of race" and it "neither says nor implies that persons are to be treated differently on account of their race." *Crawford*, 458 U.S. at 537, 538. Proposition 209 is a "simple . . . modification of . . . antidiscrimination laws" to eliminate the loophole for affirmative action preferences and such modifications "never ha[ve] been viewed as embodying a presumptively invalid racial classification." *Id.* at 539.

More directly, *Crawford* expressly rejects petitioners' notion that elimination of racial "benefits" (equitable judicial remedies for *de facto* school segregation) must be coupled with elimination of analogous benefits in the nonracial context (equitable remedies for other constitutional violations). As the Court noted, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Id.* at 541-42 (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). Similarly, "a 'dual constitution' is not established when the State chooses to go beyond the requirements of the Federal Constitution in some areas but not others." *Id.* at 542 n.28. Thus, California is permitted to "go beyond the requirements of the Federal Constitution" by banning all racial preferences without also banning preferences for "others," particularly since the "differences in fact" between racial and other preferences is constitutionally compelled and much starker than the differential remedies in *Crawford*.

Moreover, as even petitioners concede, *Crawford* clearly authorizes all subsequent constitutional amendments to overturn the "California Supreme Court's . . . interpretation of the state's equal protection clause," because the *Crawford* Court "would not interpret the Fourteenth Amendment to require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people." Pet. 21 n.15; *Crawford*, 458 U.S. at 540. Here, as in *Crawford*, Proposition 209 simply overturns the California Supreme Court's interpretation of the state equal protection clause as permitting racial preferences in some circumstances (notwithstanding that clause's plain language and persuasive dissenting opinions). *See Price v. Civil Serv. Comm'n*, 604 P.2d 1365 (Cal.), *cert. dismissed*, 449 U.S. 811 (1980); *id.* at 1383-91 (Mosk, J., dissenting); *DeRonde v. Regents of the Univ. of California*, 625 P.2d 220 (Cal.), *cert. denied*, 454 U.S. 832 (1981); *id.* at 229-36 (Mosk, J., dissenting).

According to petitioners, *Crawford* upheld Proposition 1 because it was a mere "repeal" pursuant to which "[s]tate and local governments remained free voluntarily to adopt race-conscious busing" and thus left the political process untouched. Pet. 21 n.15. However, the effect of Proposition 1 on the political process – whatever its significance – necessarily relates only to the *second* prong of the *Hunter/Seattle* test, i.e., whether the political process has been reordered.[16] It

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[16] In any event, *Crawford* in no way supports petitioners' bizarre suggestion that the state may only "repeal" *existing* extra-constitutional benefits, but is somehow foreclosed from *prospectively* eliminating precisely the same programs if enacted the next day. To the contrary, both *Crawford* and *Seattle* held that it was constitutionally irrelevant whether the "benefit" being overturned post-dates or "predates that taken by the State" since the invalidated program was "not required by the Federal Constitution in the first place." *Seattle*, 458 U.S. at 480 n.23; *Crawford*, 458 U.S. at 538. Were it otherwise, a state constitution could repeal all existing programs, state agencies or municipalities could immediately re-enact the same programs again, and this absurd tug-of-war could continue

inherently can say nothing about whether the initiative is a "racial classification," the prerequisite essential to even "trigger application of the *Hunter* doctrine." *Seattle*, 458 U.S. at 474. If, as petitioners maintain, all state constitutional provisions eliminating programs beneficial to minorities are "racial classifications," the *Crawford* Court would have found that Proposition 1 created a racial classification and then explained that this nonetheless had no effect on the political process, but merely on the judicial process for ordering *de facto* busing. *Crawford*, however, explained that Proposition 1 was not a "racial classification" because it did not "allocate governmental *or judicial power* on the basis of a discriminatory principle." 458 U.S. at 528 (emphasis added). And, of course, whether an initiative retroactively repeals, or prospectively proscribes, certain policies cannot possibly affect whether it has a "racial focus." *Seattle*, 458 U.S. at 472.

4. With respect to the second prong of the *Hunter/Seattle* test, Proposition 209 is nothing more than a substantive change in the State's policy concerning the permissibility of racial preferences. Far from restructuring the political process to impose a burden on minorities, Proposition 209 has no effect on the political process at all. On the most basic level, Proposition 209 does not mention the political process, so all the same methods for enacting laws, or lobbying therefor, continue to exist in precisely the same form after Proposition 209.[17] Nor has the State reallocated political authority in

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ad nauseum in perpetuity. Thus, *Crawford* simply makes the obvious point that "repeal or modification" of racially beneficial laws may not be accompanied by "something more" that *violates* the Constitution; i.e., explicitly changing the political process for minorities, as in *Hunter v. Erikson*, 393 U.S. 385 (1969), or authorizing discrimination, as in *Reitman v. Mulkey*, 387 U.S. 369 (1967). *Crawford*, 458 U.S. at 538 n.20, 541. Finally, petitioners' entire claim of extant injury is premised on the harm caused by Proposition 209's *repeal* of *existing* programs – which even they concede is constitutional under *Crawford*.

[17] For this reason, *Hunter* is entirely irrelevant here. In *Hunter*, an amendment to the City Charter directly burdened the political process by

a discriminatory manner. *Seattle*, 458 U.S. at 470. In enacting Proposition 209, California simply made a substantive decision to "prohibit[ ] all race and gender preferences by state entities." App. A34. This substantive policy change is obviously not a change in the level of government or the "political process or the decisionmaking mechanism used to *address* racially conscious legislation." *Seattle*, 458 U.S. at 485 (emphasis in original). Like virtually every other state, permissible use of racial and gender discrimination by local and state agencies has *always* been governed by the California Constitution, in its equal protection clause and elsewhere. *See* Cal. Const. art. I, §§ 7, 8. Proposition 209 simply eliminates the narrow exception for such racial preferences previously authorized by the California Supreme Court.

Thus, while *Seattle*'s Initiative 350 reordered the political process by transferring decisionmaking authority over *de facto* busing from the School Board to the "new and remote level of" the State Legislature, Proposition 209 simply changed the *State*'s pre-existing substantive policy by "prohibit[ing] all racial and gender preferences by state [and local] entities." *Seattle*, 458 U.S. at 483; *id.* at 482 n.25. Thus, Proposition 209 is plainly a "simple change in policy"

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enacting a "double vote" requirement under which fair housing legislation – and only fair housing legislation – would become law only if a majority of the City Council *and* a majority of voters agreed. *See Crawford*, 458 U.S. at 541 (discussing the *Hunter* Amendment: "[W]hereas most ordinances regulating real property would take effect once enacted by the City Council, ordinances prohibiting racial discrimination in housing will be forced to clear an additional hurdle."). *Hunter* quite sensibly held that requiring only black citizens to win two votes before garnering favorable legislation was no more constitutional than requiring black citizens alone to take two driving tests before securing a license. It was this direct manipulation of the political and lawmaking process through an explicit racial classification that imposed the discriminatory racial burden condemned in that case. 393 U.S. at 393.

on racial matters that *Seattle* explicitly endorsed, rather than a "forbidden reallocation of power." 458 U.S. at 476.[18]

5. Of course, if *Seattle* is construed, notwithstanding all of the above, to disable states from ever eliminating public racial preferences, it would be irreconcilable with *Crawford*, the Court's subsequent decisions establishing nonminorities' equal rights under the Fourteenth Amendment and the legion of cases establishing that a state may require its subordinate entities to take any action consistent with the Constitution. Thus, should the Court grant *certiorari*, and determine that *Seattle* does mandate the bizarre result urged by petitioners, it should reverse *Seattle*.

II. A State Constitution's Imposition Of Racial And Gender Neutrality On State And Local Governments Is Not Preempted By Either Title VII Or The Fourteenth Amendment

Petitioners devote the bulk of their brief to establishing that both Title VII and the Fourteenth Amendment permit racial preferences in narrow circumstances and that this grants public entities certain flexibility to deal voluntarily with the competing demands of minorities and nonminorities regarding such preferences, free from federal judicial litigation. While some justices have indeed noted the desirability of granting states some discretion to make their own determinations on racial preferences, free from federal judicial

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[18] Petitioners do not even attempt to refute this dispositive distinction, presumably because they recognize it is irrefutable. *See* Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 Hastings Const. L.Q. at 1046 ("On its face [Proposition 209] looks more like a mere change of policy rather than a direct attempt to reallocate political power within the state. Unlike the Akron Charter Amendment and [*Seattle*'s] Initiative 350, [Proposition 209] does not directly declare that it is withdrawing political authority from one government level and vesting it solely in a higher one.").

interference,[19] this obviously cannot, contrary to petitioners' assertion, supply a rational basis for the federal judiciary to eliminate the state's discretion to make its own determinations concerning racial preferences. Rather, as Justice Kennedy has noted, it is precisely because of the due regard owed the "constitutional responsibilities of the political branches" that the "Fourteenth Amendment ought not to be interpreted to reduce a state's authority in this regard, unless, of course, there is a conflict with federal law or a state remedy is itself a violation of equal protection." *Croson*, 488 U.S. at 518 (Kennedy, J., concurring). Amazingly, under petitioners' inscrutable logic, unelected federal judges can best *enhance* states' autonomy over racial preferences by interpreting the Fourteenth Amendment to "reduce a state's authority in this regard" and by finding that a state law is preempted even if it is *not* in "conflict with a federal law" such as Title VII and even if it is *not* "itself a violation of equal protection." Contrary to petitioners' suggestion, however, the federal judiciary is authorized to invalidate only laws that conflict with the Fourteenth Amendment or Title VII; it has no warrant to choose for the state which of the permissible compliance options are "preferable" or which inferior subdivision within the state should make that determination. Pet. 29. It certainly cannot do so in the name of *deferring to* state autonomy.

In enacting Proposition 209, California *has* exercised *its* "discretion" to determine for itself the desirability of racial preferences and concluded that such preferences are not narrowly tailored to any interest it deems compelling or important. Since this voluntary decision concededly complies with the substantive commands of the Fourteenth Amendment and Title VII, this law cannot be invalidated by the federal courts

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[19] *But see Croson*, 488 U.S. at 513-14 (Stevens, J., concurring) ("It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed.")

in the name of securing "voluntary compliance" with those provisions.

Consequently, petitioners are forced to concede that state legislatures may prohibit state agencies from using racial preferences and municipal laws may do the same for municipal governments, without in any way running afoul of the "policy" of encouraging voluntary compliance with Title VII and the Fourteenth Amendment. Pet. 16, 24, 25. Nevertheless, petitioners seem to be arguing that if precisely the same command is imbedded in the state constitution, it somehow becomes contrary to these "policies" and is thus "preempted" by Title VII and the Fourteenth Amendment. But if state or municipal statutes can eliminate preferences without conflicting with the voluntary compliance policies of Title VII and the Fourteenth Amendment, it is quite impossible for a state constitutional provision eliminating such preferences to be in conflict with those federal laws. The question whether an inferior law conflicts with the Constitution or a federal statute, or their broader "purposes," cannot possibly be affected by the *level* of state government at which the law is enacted. In this regard, as the district court correctly noted, state constitutions stand in precisely the same shoes as inferior state laws. App. B64 n.37. Thus, even assuming the level of state government at which a law is enacted affects "political participation rights" under *Seattle* (by rendering lobbying of local governments futile), it inherently says nothing about whether that law conflicts with a *superior* federal law.

In short, petitioners seek to convert this Court's desire to give state and local governments some leeway to resolve the racial preference issue, without unnecessary intrusion by federal courts, into a federal judicial *command* that local governments must have absolute discretion to resolve this issue free from interference by the *state constitution*. Needless to say, however, neither inferior municipal governments nor the federal judiciary may override the state constitution's determination concerning whether such municipalities have a sufficient "interest" in discriminating against California citizens. Local

California governments, created by the people of California through the state constitution, have no power to resist the constitutionally permissible decisions of their creators. Rather, "ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994).[20] Indeed, "the essence of our federal system is that within the realm of authority left open to them under the Constitution, the *States* must be equally free to engage in *any activity that their citizens choose* for the common weal, no matter how unorthodox or unnecessary anyone else – *including the judiciary* – deems state involvement to be." *Garcia*, 469 U.S. at 546 (emphasis added).

As this quote implies, it is even more obvious that the federal judiciary may not substitute its judgment for California citizens on whether they have an "interest" in having their government discriminate against them – regardless of whether petitioners believe that this may save California burdensome litigation. As the Ninth Circuit noted, "[I]f the federal courts were to decide what the interests of the people are in the first place, judicial power would trump self-government as the general rule of our constitutional democracy." App. A37-A38. *See also Missouri*, 515 U.S. at 113 (O'Connor, J., concurring) ("Federal courts . . . must always observe their limited judicial role," particularly "where States historically have been sovereign") (internal citations omitted). Indeed, even if the state defends a program of racial or gender discrimination, federal courts will not *accept* a purported justification unless

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[20] *See also Seattle*, 458 U.S. at 476 ("States traditionally have been accorded the widest latitude in ordering their internal government processes and school boards, as creatures of the States, obviously must give effect of policies announced by the state legislature."); *id.* at 480 n.23; *City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668, 672-73 (1976); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) (Blackmun, J.); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933).

it actually motivated a state at the time of enactment. *Shaw v. Hunt*, 116 S. Ct. at 1902-03; *Miller v. Johnson*, 115 S. Ct. 2475, 2490 (1995); *United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996). It necessarily follows that the state is not required to advance an interest that it expressly disavows. Even petitioners agree that it is not "exclusively the province of the federal judiciary to decide when, if, and how corrective measures are to be instituted." Pet. 30. While petitioners believe that this is the exclusive province of *local* governments, as guaranteed by the federal courts, it is in fact exclusively the province of the state, unless the state decides to delegate such power to local governments. As *Croson* noted, a "local subdivision . . . has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction" only "*if delegated the authority from the State.*" *Croson*, 488 U.S. at 491-92 (emphasis added).

In any event, even if the state constitution was not entirely free to impose on its inferior entities policies that concededly are not "preempted" by Title VII if voluntarily enacted by those inferior entities themselves, it is quite clear that Proposition 209 is not preempted because it is consistent with both the "purposes" and commands of Title VII.[21] The

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[21] Petitioners argue that Section 1104 of the 1964 Civil Rights Act, in addition to Section 708, also governs Title VII preemption law and that Section 1104 proscribes any state law that is "inconsistent with the purposes of the Act." However that may be, the Court in *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), squarely held that "[i]n *two* sections of the 1964 Civil Rights Act, §§ 708 *and 1104*, Congress has indicated that *state laws will be preempted only if they actually conflict with federal law*." *Id.* at 281 (emphasis added). *See id.* at 295-96 (Scalia, J., concurring). The *Guerra* Court therefore upheld California's pregnancy preference law because it did not "prevent employers from complying with both the federal law (as petitioners construe it) and the state law." *Id.* at 290-91. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). Thus, *Guerra* squarely held that laws which do not "prevent compliance" with Title VII are neither "inconsistent with" nor otherwise in conflict with that statute, and thus are not preempted. In any event, as the court below also

United States, which enforces Title VII, conceded this below. Brief of the United States at 42 (filed Feb. 21, 1997).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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correctly noted, Proposition 209's overturning of policies mandating racial preferences cannot be "inconsistent" with the "purposes" of Title VII since Title VII expressly says that its purpose is not to "grant preferential treatment to any individual or to any group because of the race. . . . " 42 U.S.C. § 2000e-2(j). *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) ("Title VII does not demand that an employer give preferential treatment to minorities and women.").

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In the

Supreme Court of the United States

October Term, 1996

COALITION FOR ECONOMIC EQUITY, et al.,
Petitioners,

v.

PETE WILSON, Governor of the State of California, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF WARD CONNERLY, RICHARD HANLIN, SAMUEL J. CULLERS, JANICE INGRAHAM, AND PACIFIC LEGAL FOUNDATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Ward Connerly, Richard Hanlin, Samuel J. Cullers, Janice Ingraham, and Pacific Legal Foundation respectfully submit this brief amicus curiae in opposition to the petition for writ of certiorari. The parties have consented to the filing of this amicus curiae brief. The letters of consent have been lodged with the Clerk of this Court.[1]

Ward Connerly was the chairman for the California Civil Rights Initiative campaign, the group responsible for placing Proposition 209 on the California ballot. A member of the University of California Board of Regents since 1993, Mr. Connerly focused the attention of the nation on the University's race-based system of preferences in its admissions policy. On July 20, 1995, following Mr. Connerly's lead, a majority of the Regents voted to end the University's use of race as a criteria for admission. Mr. Connerly is currently the chairman of the American Civil Rights Institute, a national non-profit organization aimed at educating the public about the problems created by racial and gender preferences.

Richard Hanlin is president and sole principal of Hanlin Construction, Inc., a small licensed construction firm headquartered in San Francisco, California. A white male, Mr. Hanlin wishes to be treated equally by his government without regard to his race and gender. Currently, Mr. Hanlin is not considered for certain public contracts administered by the City of San Francisco which have been completely set aside for

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[1] Pursuant to Supreme Court Rule 37.6, amici affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

minority- and women-owned businesses. Mr. Hanlin cannot take advantage of San Francisco's 10% bid preference reserved solely for minority- and women-owned businesses, whereby a favored business can bid up to 10% higher than the lowest qualified bidder and still win the contract. Mr. Hanlin's thin profit margins render his firm essentially noncompetitive for public contracts. Mr. Hanlin cannot compete equally for contracts let by many other municipal and state entities for the same reasons. Under Article I, Section 31, of the California Constitution (Article I, Section 31) [2] Mr. Hanlin will be able to compete on equal footing for public contracts administered by the City of San Francisco.

Samuel J. Cullers also stands to benefit from the implementation of Article I, Section 31, albeit for different reasons than Mr. Hanlin. Mr. Cullers is president and sole principal of Samuel J. Cullers & Associates, Inc., a licensed professional services contracting firm located in Sacramento, California. A black male, Mr. Cullers wishes to be treated equally by his government without regard to his race and gender. The current regime of set asides and preferences for minority- and women-owned contracting firms is discriminatory and stamps Mr. Cullers with an unwarranted badge of inferiority. Mr. Cullers wants the quality of his work to speak for itself. Instead, the current system harms Mr. Cullers' reputation and standing in the business community. Article I, Section 31, ends set-asides and other racial preferences and allows Mr. Cullers to be judged based upon his work, not the color of his skin. Further delay in the implementation of Article I, Section 31, will only serve to perpetrate the unfounded myth that Mr. Cullers cannot compete with other contractors without help from the government.

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[2] Article I, Section 31, of the California Constitution is popularly known as the California Civil Rights Initiative or Proposition 209.

Janice Ingraham is a student at San Bernardino Valley Community College in San Bernardino, California. Ms. Ingraham is a white woman and has definite plans to apply to the nursing program at a University of California campus. Ms. Ingraham wishes to compete equally for a position in nursing school without regard to her race and gender, and also wishes to be treated equally by the Community College without regard to her race or gender. Ms. Ingraham previously challenged academic programs designed specifically for students of certain races. *Ingraham v. San Bernardino Community College District Governing Board*, United States District Court, Eastern District of California, No. CIV-S-589 MLS GGH. A settlement was reached with the California Community Colleges, which opens programs at 106 California Community Colleges to all students equally without regard to race. Additionally, the settlement prohibits the Community Colleges from discouraging students from participating in classes on the basis of race or advertising their programs in such a way to imply that a program is designed for students of particular races. Ms. Ingraham served as regional coordinator for the "Yes on 209" campaign, and spoke publicly in favor of passage of the measure on numerous occasions. Ms. Ingraham has three young daughters, two of whom are white and one of whom is half Mexican-American. Ms. Ingraham wishes her daughters to be treated equally without regard to their race or gender. In pursuing her educational goals, Ms. Ingraham wishes to be judged as an individual, this will not occur until Article I, Section 31, is implemented.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's

position has broad support within the general community. PLF's Board has authorized the filing of a brief amicus curiae in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the area of group-based preferences and civil rights will provide an additional viewpoint with respect to the issues presented. PLF has participated in numerous other cases involving group-based preferences before this Court including, but not limited to, *Board of Education of the Township of Piscataway v. Taxman*, No. 96-679; *Adarand Constructors, Inc. v. Pena*, ___U.S.___, 115 S. Ct. 2097 (1995); *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989); and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987).

Pacific Legal Foundation attorneys are also counsel of record in state court cases seeking to implement Article I, Section 31, of the California Constitution. *Wilson v. State Personnel Board*, Sacramento Superior Court No. 96-CS01082 (suit filed on behalf of California Governor Pete Wilson and Proposition 209 Chairman Ward Connerly seeking to invalidate five California statutory schemes under Article I, Section 31, and the Equal Protection Clause); *High Voltage Wire Works, Inc. v. City of San Jose*, Santa Clara Superior Court No. CV 768694 (suit seeking a judicial declaration that San Jose City contracting ordinance grants a preference to certain groups and individuals on the basis of race and gender in violation of Article I, Section 31).

Amici contend that Article I, Section 31, of the California Constitution is entirely consistent with both the Fourteenth Amendment to the United States Constitution and Title VII of the Civil Rights Act of 1964. Recognizing that the parties to this action will do an excellent job of discussing the "*Hunter*

trilogy"[3] and explaining its applicability to Article I, Section 31, amici will focus on a broader, albeit no less important issue: whether notions of comity and federalism counsel against granting the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California enjoining the defendant class[4] from implementing Article I, Section 31, is reported at 946 F. Supp. 1480 (N.D. Cal. 1996). The opinion of the Ninth Circuit Court of Appeals vacating the preliminary injunction and declaring Article I, Section 31, constitutional, is reported at 110 F.3d 1431 (9th Cir. 1997).

STATEMENT OF THE CASE

On November 5, 1996, California voters amended their constitution to guaranty that their state would

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[3] The "*Hunter* trilogy" is composed of *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982); and *Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527 (1982).

[4] The certified defendant class consists of "all state officials, local government entities or other governmental instrumentalities bound by Proposition 209." *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480, 1490, n.6 (N.D. Cal. 1996).

> not discriminate against, or grant preferential treatment to, any individuals on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Cal. Const. Art. I, § 31(a).[5] This victory at the ballot box for initiative supporters was short lived as opponents of Article I, Section 31, quickly moved the battle from the political arena to the federal courthouse. On November 6, 1996, minutes after the courthouse doors opened and before Article I, Section 31, had been implemented or enforced against anyone, this case was initiated in the United States District Court of the Northern District of California. Plaintiffs stated two causes of action. First, they claimed that Article I, Section 31, of the California Constitution violated the Equal Protection Clause as interpreted by this Court in *Hunter v. Erickson*, 393 U.S. 385, and *Washington v. Seattle School District No. 1*, 458 U.S. 457. *Coalition*, 946 F. Supp. at 1489. Second, they alleged that Article I, Section 31, was inconsistent with, and therefore preempted by, Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972. *Id.* at 1490. Declining to abstain until a state court had been provided with an opportunity to interpret Article I, Section 31,[6] the District Court granted a temporary restraining order on

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[5] This provision of the California Constitution became effective on November 6, 1996. Cal. Const. Art. II, § 10(a). ("An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise.").

[6] *Coalition*, 946 F. Supp. at 1492 n.8 ("After having carefully reviewed the circumstances that defendants have forwarded in support of their request for abstention, this Court chooses not to abstain.").

November 27, 1996, and granted a preliminary injunction on December 23, 1996. *Coalition*, 946 F. Supp. at 1491. An appeal followed.

On April 8, 1997, the Ninth Circuit Court of Appeals reversed and vacated the preliminary injunction. *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431, 1448 (9th Cir. 1997). Before addressing the equal protection and preemption issues raised by this case the Ninth Circuit "pause[d] to consider whether this case even belongs in federal court." *Coalition for Economic Equity v. Wilson*, 110 F.3d at 1436. The Ninth Circuit acknowledged that as a "general rule" the federal courts "'ought not to consider the Constitutionality of state statute in the absence of a controlling interpretation of its meaning and effect by the state courts.'" *Id.* at 1437 (quoting *Arizonans for Official English v. Arizona*, ___U.S.___, 117 S. Ct. 1055, 1072 (1997) (quoting *Poe v. Ullman*, 367 U.S. 497, 526 (1961) (Harlan, J., dissenting)). Although concerned with addressing the constitutionality of a "one-day-old, never-applied-law" the Ninth Circuit determined that given the District Court's extensive factual finding in this matter it could properly reach the merits of the case. *Coalition*, 110 F.3d at 1437.

Turning to the merits, the Ninth Circuit analyzed the constitutionality of Article I, Section 31, under two distinct lines of equal protection authority.[7] Applying the "conventional" method of equal protection analysis the court concluded that "there is simply no doubt that Proposition 209 is constitutional." *Coalition*, 110 F.3d at 1439. The Ninth

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[7] According to the court, this case implicated "conventional" equal protection analysis, "which looks to the substance of the law at issue," as well as "political structure" equal protection analysis, "which looks to the level of government at which the law was enacted." *Coalition*, 110 F.3d at 1439.

Circuit was equally empathic in its conclusion that Article I, Section 31, survived constitutional scrutiny under the "political structure" equal protection analysis articulated by this Court in *Hunter* and *Seattle School District No 1*. "The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits." *Coalition*, 110 F.3d at 1446. A petition for rehearing was denied and a suggestion for rehearing en banc was rejected by the Ninth Circuit on August 21, 1997. Shortly thereafter a petition for writ of certiorari was filed in this Court.

SUMMARY OF ARGUMENT

This Court has long been of the view that although a "case" or "controversy" may satisfy the requirements of Article III, Section 2, of the United States Constitution, principles of federalism and comity militate against federal court jurisdiction. The question to be asked in constitutional cases that threaten state laws is whether the conflict is really necessary. Federal courts should hesitate before ruling on the constitutionality of state constitutional provisions out of deference to principles of federalism and in recognition that states should be allowed a certain amount of freedom to conduct novel social experiments.

By enacting Article I, Section 31, California voters have begun just such an experiment. Unfortunately, this venture was placed on hold as this case has made its way through the federal judiciary. Denying the petition for writ of certiorari would allow California to continue this novel and critical social experiment in what may very well be the most important area of social policy in our Country today.

ARGUMENT

THIS COURT SHOULD DENY THE PETITION AND ALLOW CALIFORNIA TO CONDUCT ITS NOVEL SOCIAL EXPERIMENT

This case asks an exceedingly simple question: may the voters of California, consistent with the Equal Protection Clause of the Fourteenth Amendment[8] and Title VII of the Civil Rights Act of 1964,[9] add to their constitution a provision that

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[8] The Equal Protection Clause promises that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[9] Title VII of the Civil Rights Act provides in pertinent part:

> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1)-(2).

explicitly prohibits their state from discriminating against, or granting preferential treatment to, any group or individual on the basis of immutable characteristics such as race and gender? Although simple, the significance of this question cannot be overstated, as California becomes more diverse questions of how the state government interacts with its increasing multi-ethnic citizenry take on an increased sense of importance and urgency.

This simple, yet significant, question should answer itself. Unfortunately, nearly one year after the voters of California expressed their strong desire[10] that their state must stop making decisions on the basis of race, sex, color, ethnicity, or national origin, the constitutional status of Article I, Section 31, remains in doubt. Denying the petition for writ of certiorari, thereby allowing the Ninth Circuit's decision to stand, would remove this doubt and allow the State of California to embark on its bold social experiment. Amici respectfully submit that principles of federalism and comity favor denying the petition for writ of certiorari and allowing the State of California to begin implementing Article I, Section 31, of the California Constitution.

Article III, Section 2, of the United States Constitution limits the federal courts to the adjudication of "cases" and "controversies." Determining that a case falls within the parameters of Article III does not end the inquiry, it merely changes the question from is this a case that the federal court ***can*** hear to is this a case that the federal court ***should*** hear. In the present case the District Court declined the defendants' motion to abstain until a state court had been given the opportunity to interpret Article I, Section 31. *Coalition*,

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[10] Proposition 209 passed by a margin of 54% to 46%. 4,736,180 Californians voted for the initiative and 3,986,196 cast ballots against it. *Coalition*, 110 F.3d at 1435.

946 F. Supp. at 1492 n.8. The Court of Appeals explained its reluctance to enter the fray, but concluded that, in spite of the strong federalism concerns, "this conflict really is necessary." *Coalition*, 110 F.3d at 1438 (quoting *Arizonans for Official English*, 117 S. Ct. at 1072). The question now becomes, in light of the Ninth Circuit's opinion, is further federal court review warranted, or may the State of California proceed with its challenging endeavor to develop a new and more equitable social policy with respect to how state government, in its official actions, shall address questions of race, sex, color, ethnicity, and national origin. In other words, is this conflict still necessary?

This Court has long recognized that even though a case may satisfy the requirements of Article III, in certain situations the federal judiciary should decline an invitation to exercise its jurisdiction over the matter. This is especially true in a case, such as the one at bar, where a fairly novel, uninterpreted state law is charged with being in violation of the United States Constitution. In *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941), this Court described the desirability of federal courts "exercising a wise discretion," and restraining their authority in order to give "scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." Similarly in *Younger v. Harris*, 401 U.S. 37 (1971), this Court explained that federal courts should decline to exercise jurisdiction based upon the notion of comity or "a proper respect for state functions." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10 (1987).[11]

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[11] This Court has recognized the need to decline jurisdiction even in cases, such as the one at bar, that include claims that fundamental constitutional rights and liberties are at stake. In fact, the seminal case of *Pullman* involved a claim of racial

(continued...)

More recently, in a case challenging the federal constitutional propriety of a state constitutional amendment, this Court explained that before a federal court embarks upon a constitutional analysis it must first pause to ask, "Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, 117 S. Ct. at 1072. Echoing the wisdom of Justice Harlan an unanimous Court explained:

> When anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of that core question. ... Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court.

Arizonans for Official English, 117 S. Ct. at 1073-74 (citing *Poe v. Ullman*, 367 U.S. at 526 (Harlan, J., dissenting).

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[11](...continued)
discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Despite the "substantial constitutional issue" raised by the case, this Court recognized that abstention was appropriate until a state court had interpreted the law in question. *Pullman*, 496 U.S. at 500. *Accord*, *Harrison v. National Association for the Advancement of Colored People*, 360 U.S. 167 (1959) (abstention required in a case involving Equal Protection and Free Speech challenges); *Bellotti v. Baird*, 428 U.S. 132 (1976) (abstention appropriate in case involving parental consent requirement before an abortion may be performed).

Abstention and related doctrines arise in a number of different contexts,[12] they are, however, bound together by a single common denominator, the concept of federalism. The United States are composed of sovereign units of government entitled to a certain amount of latitude in order to experiment with novel solutions to social and political problems. The idea that federalism allows the states to conduct novel, often bold, social and economic experiments, was first expressed by Justice Brandeis. His eloquent statement on this subject bears repeating:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. ... But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

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[12] *Compare Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (abstention to avoid unnecessary constitutional ruling); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959) (abstention in case based on diversity of citizenship because of unclear state law); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (abstention in cases involving state administrative procedures); *Younger v. Harris*, 401 U.S. 37 (abstention to avoid interference with state court criminal proceedings); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (abstention to avoid interference with state court civil proceedings).

New State Ice, Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandies, J., dissenting). *Accord, San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 49-50 (1973); *United States v. Lopez*, __ U.S. __, 115 S. Ct. 1624, 1641 (1995) (Kennedy, J., concurring) ("In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").[13]

Questions of racial and gender classifications have divided our nation since its inception. This Court has long been

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[13] The "laboratory" metaphor has also arisen in another line of this Court's jurisprudence which bears directly on the case at bar. Members of this Court have explained that "[o]ften a denial of certiorari on a novel issue will permit state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court." *Lackey v. Texas*, __ U.S. __, 115 S. Ct. 1421 (1995) (Stevens, J., respecting the denial of certiorari) (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., joined by Blackmun, J., and Powell, J., respecting the denial of a petition for writ of certiorari). This is true even in cases where the underlying issue is "important." *McCray*, 461 U.S. at 961 (questioning constitutionality of race based preemptory challenges); *Lackey*, 115 S. Ct. at 1421 (questioning whether executing a prisoner who has already spent 17 years on death row violates the Eight Amendment's prohibition against cruel and unusual punishment). For the moment, Article I, Section 31, is unique. However, as the petition for writ of certiorari notes, measures similar to Proposition 209 have been proposed in 26 states. Petition at 16. Allowing lower courts to address these issues "may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, __ U.S. __, 115 S. Ct. 1185, 1198 n.1 (1995) (Ginsburg, J., dissenting).

of the view that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" and that "racial distinctions are in most circumstances irrelevant and therefore prohibited." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Despite this long-standing recognition that classifications based solely on race are irrelevant and ought to be rejected, state governments have long struggled with the issue of how to remedy the present effects of prior racial discrimination and how best to "diversify" work forces and student bodies. The answer to these questions "is far from clear." California, by amending its Constitution to prohibit the state from discriminating against, or granting preferential treatment to, any individual on the basis of race or gender has, in the words of Justice Brandies, undertaken a "courageous" and "novel social experiment" to develop a new and fairer social policy governing official actions by the state.[14]

This experiment is especially appropriate in a state as richly diverse as California, where programs designed to benefit one racial group have an adverse impact on others. For example:

- Asians were severely burdened by race-conscious University of California admissions,

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[14] It almost goes without saying that while these experiments can certainly be innovative and unique, they cannot contravene the constitutional mandate. "These novel experiments, of course, must comply with the United States Constitution; but their mere novelty should not be a strike against them." *Chandler v. Miller*, __ U.S. __, 117 S. Ct. 1295, 1306 (1997) (Rehnquist, C.J., dissenting). For all the reasons put forward in respondents' oppositions to the petition for writ of certiorari, amici agrees that Article I, Section 31, is entirely consistent with the United States Constitution.

often more than whites. *See, e.g.*, Sarah Lubman, *Campuses Mull Admissions Without Affirmative Action*, Wall St. J., May 16, 1995, at B1 (under color-blind system, Asians would have made up 7.6% to 10.4% more of the 1994 freshman class at UC Berkeley than they did under the preferential system; whites would have made up 2% to 7.5% more).

- Chinese-Americans found themselves facing a 40% maximum quota--supposedly justified by "diversity" and desegregation concerns--in admissions to the prestigious Lowell High School in San Francisco. Elaine Woo, *Caught on the Wrong Side of the Line?*, L.A. Times, July 13, 1995, at A1.

Similarly, "goals" and "timetables" could just as well be turned against nonwhites as in their favor:

- True to their schemes of racial proportionality, California government agencies had begun setting "goals" and "timetables" to increase the hiring of *whites* in jobs where whites were under- represented. Ed Mendel, *Affirmative Action Goal: More White Men?*, San Diego Union-Tribune, Oct. 16, 1996, at A-1.

- There are calls for more programs that benefit one nonwhite group at the expense of another. *See, e.g.*, Emily Adams, *Compton Mayor Offers Plans to Ease Tensions*, L.A. Times, Sept. 8, 1994, at B3 (Latino leaders in Compton--where 51% of the population is Latino, but 78% of the city employees are

> African-American--were pushing for an affirmative action program that would benefit Latinos); Patrick McDonnell, *As Change Again Overtakes Compton, So Do Tensions*, L.A. Times, Aug. 3, 1994, at A3 (discussing Latino claims that they are greatly under represented in Los Angeles postal jobs, while African-Americans are greatly over represented). Edmund Newton, *Latinos Seek Funding Parity After Black Group Gets City Grant*, L.A. Times, Aug. 8, 1993, at J3.

In a state as ethnically mixed as California, any racial group may well find itself the victim of racial preferences and basing social policy on the need to balance the interests of "minorities" against the interests of the "majority" no longer makes sense. In many California cities, whites have long been a minority, and they are now becoming a minority in the state as a whole. There will shortly be no "majority" California racial group at all. David E. Hayes-Bautista & Gregory Rodriguez, *California; New Year, We Will All Be Minorities*, L.A. Times, Aug. 13, 1995, at M1. In such a situation, all groups stand to gain from a ban on government race and gender discrimination because government institutions cannot be trusted with the awesome power to distribute among competing groups entitlements, benefits, and privileges on the basis of race, sex, color, or national origin. As California moves into the next century it is becoming increasingly apparent that antiquated notions of racial preferences and discrimination against some in favor of others represents a failed social policy. California voters have, accordingly, rejected this social policy and embarked upon a new course, tolerating no discrimination whether it be based on benign or malicious intent.

> In my mind, government-sponsored racial discrimination based on benign prejudice is just as

> noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.

Adarand Constructors, Inc. v. Pena, 115 S. Ct. at 2119 (Thomas, J., concurring).

Last term, in the context of another politically charged case, this Court reemphasized that important questions of social policy are best decided by an informed electorate, not the judiciary.

> Throughout the nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.

Washington v. Glucksberg, __U.S. __, 117 S. Ct. 2258, 2275 (1997). Unfortunately, California's bold social experiment has been placed on hold for nearly one year by the premature intervention of the federal courts in a matter of broad social policy. A denial of the petition for writ of certiorari would allow the State of California to move forward with its new policy of nondiscrimination and begin to serve as a laboratory that the rest of the nation can observe and, should California's policy prove to be a wise one, emulate. This conflict is no longer necessary. The court below has left no doubt as to the facial constitutional validity of Article I, Section 31. Amici urge this Court to recognize, as did the opinion below, that California's willingness to carry out this courageous experiment is simply one of the "happy incidents of federalism." Denying the petition for writ of certiorari would allow California's "novel social experiment" to proceed unencumbered and without further delay.

CONCLUSION

Democracy is, by definition, self-correcting. By ratifying Article I, Section 31, the State of California has departed from the rest of the nation on issues of racial and gender preferences and discrimination. If California's experiment fails to create a fair and just result in this volatile area of social policy, voters are free to amend their Constitution once again, and repeal Article I, Section 31, in favor of another course of action. If, on the other hand, the experiment succeeds, other states will certainly follow California's lead, and adopt similar prohibitions on governmental discrimination. Denying the petition for writ of certiorari allows this profound debate to continue, "as it should in a democratic society."

DATED: September, 1997.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1996

COALITION FOR ECONOMIC EQUITY, ET AL.,

Petitioners,

v.

PETE WILSON, GOVERNOR OF THE STATE OF CALIFORNIA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION OF HUMAN RIGHTS ADVOCATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION OF HUMAN RIGHTS ADVOCATES TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Human Rights Advocates hereby respectfully moves this Court for leave to file a brief in the above-entitled case, pursuant to Rule 37 of the Rules of this Court. The applicant is a non-profit California corporation that provides education about the application of international human rights law in domestic and international fora. *Amicus Curiae* has requested the consent of the Petitioners' Counsel of Record and the State Attorney General who represents the defendant class. Consent of those parties to file such brief has been granted.[1]

Human Rights Advocates endeavors to advance the cause of human rights to ensure that the most basic protections are afforded to everyone. Subsequently, Human Rights Advocates has duly submitted briefs as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal statutes at issue.[2]

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[1] *Amicus Curiae* is unclear how many other parties are involved in this matter. Letters from all parties consenting to the filing of this brief are being sent with this brief to the Clerk of this Court.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] Examples of amicus briefs that Human Rights Advocates has filed include those in the following cases: *Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34 (2nd Cir. 1985); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996).

Human Rights Advocates would like to take the opportunity to inform this Court of the applicable treaty standards that would help in interpreting the California law in question in this case, as well as the constitutional standards involved. *Amicus* is specifically concerned that the opinion of the Court below raises serious implications on the ability of state and local government to comply with those treaty standards. Additionally, *amicus* will address the issues raised by petitioners related to the meaning of the California Constitutional provision with respect to equal protection under the United States Constitution and civil rights statutes.

The parties have not addressed this very important aspect of the law.[3] For these reasons, Human Rights Advocates respectfully urges the Court to grant this motion to file the accompanying *amicus curiae* brief in support of the petitioners.

Respectfully submitted,

CONSTANCE DE LA VEGA
Counsel of Record
Amicus Curiae
Human Rights Advocates

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[3] Several *Amici Curiae* did file a brief with the District Court raising the issue generally. (Brief of *Amici Curiae* in Support of Plaintiffs' Amended Complaint and for Injunctive and Declaratory Relief.)

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International Convention on the Elimination of All Forms of Racial Discrimination (CERD), *opened for signature* March 7, 1966, 660 U.N.T.S. 195 (entered into force January 4, 1969; adopted by the United States November 20, 1994) ..... *passim*

International Covenant on Civil and Political Rights (ICCPR), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976; adopted by the United States September 8, 1992) ..... *passim*

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Statement of Conrad Harper, Legal Advisor, U.S. Department of State, to the United Nations Human Rights Committee, U.N. GAOR, Hum. Rts. Com., 53rd Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995)..... 4

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BRIEF AMICUS CURIAE

SUMMARY OF THE ARGUMENT

Proposition 209 is a state initiative amending Article 1 of the California Constitution to prohibit all affirmative action programs based on race or gender. This case raises the issue of whether Proposition 209, as interpreted by the Court of Appeals for the Ninth Circuit in *Coalition for Economic Equity ("CEE") v. Wilson*, 110 F.3d 1431 (9th Cir. 1997), conflicts with U.S. treaty obligations. Proposition 209 would act to repeal all existing state and local affirmative action programs, as well as prohibit all future adoption of affirmative action programs based on race or gender. The Court of Appeals' opinion reversed an order of the United States District Court for the Northern District of California, filed December 23, 1996, which granted plaintiffs' motion for a preliminary injunction. The Court of Appeals held that Proposition 209 did not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution, thereby permitting Proposition 209 to go into effect. *Amicus Curiae* Human Rights Advocates is concerned that the ruling creates a potential conflict between the state law and treaty obligations which are now part of the Law of the Land under the Supremacy Clause of the United States Constitution.

Human Rights Advocates would like to bring to the Court's attention the treaty standards applicable to this case under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), *opened for signature* March 7, 1966, 660 U.N.T.S. 195 (entered into force January 4, 1969; adopted by the United States November 20, 1994), and the International Covenant on

Civil and Political Rights (ICCPR), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976; adopted by the United States September 8, 1992). In turn, Human Rights Advocates urges this Court to interpret the laws in question so that they conform with obligations under those duly ratified treaties. Otherwise, if Proposition 209 is upheld, the effect could impair the ability of local and state governmental entities to institute measures designed to meet U.S. obligations under the treaties and the U.S. Constitution.

This brief, therefore, is submitted in support of the petition for writ of certiorari. It is urged that this Court consider the treaty obligations when construing the application of the constitutional standards as defined in *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982); and *Romer v. Evans*, 116 S. Ct. 1620 (1996), as well as those under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to this case. These issues are of importance throughout the Land, not just in California. Because of the serious implications of the opinion of the Court below on the ability of state and local governments to comply with the treaty standards, Human Rights Advocates respectfully requests that this Court grant the Petition for Writ of Certiorari.

ARGUMENT

I. Treaty Provisions are the Supreme Law of the Land Under the U.S. Constitution

Under the United States Constitution Article VI, clause 2 of section 2, "all treaties made or which shall be

made, under the authority of the United States shall be the Supreme Law of the Land, and the Judges in every State shall be bound thereby, anything in the Constitution or Law of any State to the contrary notwithstanding." U.S. CONST. art. VI, § 2, cl. 2. When a treaty and state law conflict, the treaty controls. *See Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968); *Clark v. Allen*, 331 U.S. 503, 508 (1947); *see also Missouri v. Holland*, 252 U.S. 416, 433-35 (1920) (concluding that the validity of a treaty was not undermined by a possible infringement on states' rights under the Tenth Amendment unless it violated an express prohibition of the Constitution). Also, courts should construe treaties "in a broad and liberal spirit, and when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924).

The United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which entered into force for the United States on November 20, 1994. 140 Cong. Rec. S 7634 (June 24, 1994). The United States has joined more than 146 states that have become parties to CERD and pledged to eradicate racial discrimination within their borders.[4] Previously, the United States had become a party to the International Covenant on Civil and Political Rights (ICCPR) on September 8, 1992. 138 Cong. Rec. S 4781-84

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[4] *See* Multilateral Treaties Deposited with the Secretary-General, ST/LEG/SER.E/14, at 95, Dec. 31, 1995.

(April 2, 1992). The United States is now one of 132 countries that is a party to that treaty.[5]

CERD and ICCPR, as ratified treaties, are the Supreme Law of the Land. The United States is now bound to protect the rights enumerated in those treaties. Both treaties establish a committee to monitor compliance with the provisions of the treaty. Under CERD, this body is called the Committee on the Elimination of Racial Discrimination. CERD, Articles 8-15. The enforcement body established by the ICCPR is the Human Rights Committee. ICCPR, Articles 28-45.

In 1995, the United States' delegation to the Human Rights Committee stated that "courts of the [United States] could refer to the Covenant and take guidance from it." Statement of Conrad Harper, Legal Advisor, U.S. Department of State, to the United Nations Human Rights Committee, U.N. GAOR, Hum. Rts. Com., 53rd Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995). Indeed, in order to ensure compliance with the treaty obligations, the courts of this country should seek guidance from the ICCPR in interpreting U.S. laws. Similarly, courts could seek the same interpretive guidance from CERD provisions. This Court should therefore consider these treaty

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[5] *See* Multilateral Treaties Deposited with the Secretary-General, ST/LEG/SER.E/14, at 121, Dec. 31, 1995 (As of November 1, 1996, the number of countries that have become party to ICCPR have increased to 136, according to a report submitted to the United Nations Commission on Human Rights by the Secretary-General, Status of the International Covenants on Human Rights, Report of the Secretary-General, U.N. Commission on Human Rights, 53rd Sess., U.N. Doc. E/CN.4/1997/72 (1996)).

provisions when interpreting U.S. laws. Failure to do so will undermine the U.S. credibility as a State Party to these, as well as other, treaties.

II. Proposition 209 Impairs the Ability of State and Local Governmental Entities to Institute Measures Designed to Meet U.S. Treaty Obligations Under CERD, ICCPR, and the U.S. Constitution

Both CERD and ICCPR elaborate on the basic principles of equality and nondiscrimination. CERD focuses specifically on discrimination and thus addresses a wide range of categories of rights in which discrimination is prohibited. CERD provides that State Parties to the treaty must attempt to prohibit and to eliminate racial discrimination and to guarantee the equal right to enjoyment of civil and political rights. CERD, Article 5. Furthermore, CERD contains very specific provisions mandating affirmative action programs to remedy discrimination and provides that such actions shall not be deemed discrimination. CERD, Article 2(1).

The critical definition of racial discrimination is set forth in Article 1(1) of CERD:

> [A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

CERD, however, also provides an exception for special measures that are "taken for the sole purpose of

securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights or fundamental freedoms . . . " Article 1(4). This is an exception designed for affirmative action programs and for other measures states may take to combat discrimination.

CERD outlines the fundamental obligations of State Parties to take steps to erase discrimination within their borders and obligates States Parties to "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms . . . " CERD, Article 2(1). It also requires States Parties to ensure protections of rights within social, economic, cultural and other fields by taking "special and concrete measures . . . for the purpose of guaranteeing [racial groups or individuals belonging to them] the full and equal enjoyment of human rights and fundamental freedoms." CERD, Article 2.

The provisions in the ICCPR provide protection to much broader categories of persons and define the civil and political rights in greater detail. Part II establishes the general duties of State Parties under the ICCPR, which include the obligation to "take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." ICCPR, Article 2(2). Articles 2, 3 and 26 of the ICCPR set forth the basic principle of equal protection of the laws. Article 2(1) requires that States Parties provide the enumerated rights to all individuals within their jurisdiction without regard to "race, colour,

sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 3 specifically guarantees "the equal right of men and women to the enjoyment of all civil and political rights set forth in the . . . Covenant." Article 26 reinforces the equal protection language in Article 2 by stating that all persons are equal before the law and are entitled to equal protection regardless of any of the specified bases.

It is clear that the purpose behind Proposition 209 was to eliminate affirmative action programs that benefit women and minorities. (*See* Petition for Writ of Certiorari page 4, footnote 2.) The Court below justified its holding that Proposition 209 did not violate the Equal Protection Clause by stating that all affirmative action programs are inherently discriminatory. *CEE v. Wilson*, 110 F.3d at 1445. This definition of affirmative action conflicts with the definition of "racial discrimination" in CERD, which provides that actions "taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection . . . in order to ensure . . . equal enjoyment or exercise of human rights or fundamental freedoms shall not be deemed racial discrimination." CERD, Article 1(4). Indeed, by eliminating programs that seek to address the lack of equality in certain areas, Proposition 209 may perpetuate racial discrimination in violation of CERD since it may have the "purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an ***equal footing***, of human rights and fundamental freedoms in the political,

economic, social, cultural or any other field of public life." CERD, Article 1(1).[6]

The Human Rights Committee has also considered whether distinctions are permissible under the ICCPR which requires that the rights under that treaty be provided without regard to "race, colour, sex, language, religion, birth or other status." ICCPR, Article 2(1). The Committee recognized that "not all differentiation of treatment constitutes discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant." U.N. GAOR, Hum. Rts. Comm., 37th Sess., 984th mtg., at 4, U.N. Doc. CCPR/C/21/Rev.1/Add.1 (1989).

This Court made clear in *Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995), that a race-based preference program may be a constitutional means of remedying discrimination. Justice O'Connor in the majority opinion recognized that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* at 237. Thus, "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the

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[6] This is similar to the position of Justice Stevens, who was joined by Justice Ginsberg, in his dissent in *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting), where he noted that there is a difference between racial classifications that are used for the purpose of discrimination and those that have the goal of remedying discrimination.

'narrow tailoring' test this Court has set out in previous cases." *Id.* Proposition 209's broad sweep will prohibit all affirmative action programs, even those government programs "narrowly tailored to further a compelling interest" of remedying past discrimination, in violation of the Constitution and the provisions of CERD and the ICCPR.

In this case, four Court of Appeals justices dissented on the denial of the rehearing *en banc*. *CEE v. Wilson*, 1997 WL 563160 (9th Cir. 1997), 97 Cal. Daily Op. Serv. 6966, 97 Daily Journal D.A.R. 11,270 (opinions dissenting from the denial of rehearing *en banc*). These four justices concurred that "Proposition 209, of course is not mere repeal of existing affirmative action programs . . . Proposition 209 does much more [. . .]: It forbids all institutions of representative government from enacting race – or – gender-based affirmative action programs – and only those programs – in the future." *CEE v. Wilson*, 1997 WL 563160 at 8. If this is true, the blanket prohibition of all affirmative action programs directly conflicts with the obligation of the United States as a party to CERD, under Article 2(2) to take "special and concrete measures . . . for the purpose of guaranteeing [racial groups or individuals belonging to them] the full and equal enjoyment of human rights and fundamental freedoms." It may also impinge on the the obligation in the ICCPR to take necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized" in that treaty. ICCPR, Article 2(2). Indeed, the Human Rights Committee in 1995, after considering a report from the United States on its progress on ensuring the enjoyment of rights under the ICCPR, made the specific recommendation that affirmative action should be

adopted in order to eliminate discriminatory attitudes and prejudice toward minority groups and women.[7] Under the ruling of the Court below, Proposition 209 impairs the ability of governmental entities in California to institute remedial measures designed to meet their treaty obligations to eradicate racial discrimination under the two treaties.

Finally, CERD mandates that the United States should take affirmative steps "to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race . . . to equality before the law, notably in the enjoyment of . . . (c) [p]olitical rights . . . to take part in the Government as well as in the conduct of ***public affairs at any level*** and to have ***equal access to public service***." CERD, Article 5(c). The Court of Appeals admits that "Proposition 209 ***burdens*** members of insular minorities within the majority that enacted it who otherwise would seek to obtain race-based and gender-based preferential treatment from local entities." *CEE v. Wilson*, 110 F.3d at 1442. In this way, Proposition 209 may also impair the ability of government entities to meet their obligation under Article 5 of CERD, since it places a burden on minority groups seeking to "take part in the conduct of public affairs." CERD, Article 5(c).

Thus, it is imperative that this Court consider treaty language in determining whether to grant the petition for

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[7] See Consideration of Reports: Comments of the Human Rights Committee, United States of America, U.N. GAOR, Hum. Rts. Comm. 53rd Sess., U.N. Doc. CCPR/C/79/Add. 50 (1995) at ¶ 30.

Writ of Certiorari because of the potential negative impact that the Court's ruling below can have on U.S. treaty obligations.

III. This Court Should Consider the Two Treaties When Addressing Petitioners' Reasons in Support of The Petition for Writ of Certiorari

The treaty obligations in CERD and ICCPR above are directly relevant to the reasons cited by petitioners in support of their petition for writ of certiorari and mandate that the ruling be reconsidered, particularly with respect to the issues of access to the political process, denial of opportunity to seek protection under the Equal Protection Clause, and the flexibility that state and local governments have to implement programs to remedy discrimination.

Article 5(c) of CERD, discussed above, is useful to the consideration of the issue of access to the political process. In *Hunter v. Erickson*, 393 U.S. 385 (1969), Justice Harlan wrote that "a provision that has the clear purpose of making it more difficult for racial . . . minorities to achieve legislation that is in their interest . . . is discriminatory on its face." *Id.* at 395. The Supreme Court later adopted Harlan's reasoning in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), holding that a state may not "place special burdens on the ability of minority groups to achieve beneficial legislation . . . by lodging decisionmaking authority over the question at a new and remote level of government." *Id.* at 467. The Court should consider the CERD treaty provision which mandates State Parties to guarantee equal access to the political process

in resolving whether the decision below is consistent with the holdings of *Hunter* and *Seattle*.

The treaty obligations also are relevant to the issue of selective denial of opportunity to seek protection against discrimination in violation of the Equal Protection Clause. This Court recently held in *Romer v. Evans*, 116 S.Ct. 1620 (1996), that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of protection of the laws in the most literal sense." *Id.* at 1628. Applying this principle, this Court invalidated Colorado's Amendment 2, an initiative that disabled "government and each of its parts" from remedying discrimination against gays and lesbians.

The basic principle of equal protection of the laws articulated in *Romer* is also set forth in the ICCPR. Notably, Article 26 states that all persons are equal before the law and are entitled to equal protection regardless of any of the specified bases. Article 3 specifically guarantees the "equal right of men and women to the enjoyment of all civil and political rights . . . " The Court should consider treaty standards in resolving whether the decision below is consistent with the holding of *Romer v. Evans*.

Finally, the treaty obligations above are relevant to the issue of whether states may enact laws that impede Title VII's national policy of encouraging state and local governments to voluntarily remedy past discrimination. This Court has recognized that in passing Title VII, Congress intended to encourage public and private employers to voluntarily enact race- and gender-based

affirmative action programs in order to accomplish the national goal of "break[ing] down old patterns of racial segregation and hierarchy." *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). In denying state and local entities the power to voluntarily redress past discrimination through race- and gender-conscious means, Proposition 209 not only impedes the furtherance of Title VII's congressionally mandated goal, but it will also impede the goal of eradicating racial and gender discrimination mandated by CERD and ICCPR. The Court should take those requirements into consideration in assessing the standards applied by the Court below.

The two treaties, therefore, support the petitioners' request for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel of Record
Amicus Curiae
Human Rights Advocates

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No. 97-369

In The

Supreme Court of the United States

October Term, 1996

COALITION FOR ECONOMIC EQUITY, et al.,

Petitioners,

v.

PETE WILSON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION OF THE NATIONAL ORGANIZATION OF WOMEN AND BLACKS IN GOVERNMENT FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION OF THE NATIONAL ORGANIZATION OF WOMEN AND BLACKS IN GOVERNMENT FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

Pursuant to Rule 37.2(b), the National Organization of Women and Blacks in Government move for leave to file the attached brief *amici curiae* in support of the Petition for Certiorari.

We are filing this motion because, despite our best efforts, we have not yet received written consents from all of the parties to the proceeding listed in the jurisdictional statement submitted in this case on behalf of Appellant. While consents have been received from most such parties, Intervenor Defendant Californians Against Discrimination and Preferences has specifically declined to consent.

INTEREST OF THE *AMICI CURIAE*

Amicus Curiae California National Organization for Women is a grassroots, political organization focused on achieving equality for women. Activities include lobbying, electing feminists into office at all levels, community awareness and activities, education, and publicity on women's rights issues. There are approximately 48 chapters across the state, with a headquarters office in Sacramento. Since 1966, NOW has been a volunteer-driven organization with members in every state and national headquarters in Washington, D.C. NOW works on a wide range of women's equality issues, including affirmative action, economic rights, the Equal Rights Amendment, reproductive rights, health care, lesbian/gay/bi rights,

civil rights, eliminating racism, early childhood development, older women's rights, homemakers' rights, violence against women, education, and more. Because affirmative action is an important tool for remedying discrimination and ensuring equal opportunity for women, CA NOW actively opposed Proposition 209.

Amicus Curiae Blacks in Government (BIG) is a national nonprofit membership organization incorporated in Washington, D.C. in 1976. BIG is comprised of more than 250 chapters, and seeks to represent the interests of more than 2.5 million African Americans employed by federal, state and local government agencies. BIG has sought to promote excellence in government through equality of opportunity and to promote the elimination of all vestiges of racism and discrimination. BIG believes affirmative action is necessary to remedy the effects of historic and institutionalized discrimination and to ensure equal opportunity for persons of color in public employment.

The intent of these *amici* is to cast further light upon the last issue advanced in the petition for certiorari: whether states may enact laws that impede Title VII's national policy of encouraging state and local governments to adopt properly supported and narrowly crafted affirmative action plans as a means of remedying prior and possibly ongoing discrimination.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*

Amicus Curiae California National Organization for Women is a grassroots, political organization focused on achieving equality for women.[1] Activities include lobbying, electing feminists into office at all levels, community awareness and activities, education, and publicity on women's rights issues. There are approximately 48 chapters across the state, with a headquarters office in Sacramento. Since 1966, NOW has been a volunteer-driven organization with members in every state and national headquarters in Washington, D.C. NOW works on a wide range of women's equality issues, including affirmative action, economic rights, the Equal Rights Amendment, reproductive rights, health care, lesbian/gay/bi rights, civil rights, eliminating racism, early childhood development, older women's rights, homemakers' rights, violence against women, education, and more. Because affirmative action is an important tool for remedying discrimination and ensuring equal opportunity for women, CA NOW actively opposed Proposition 209.

Amicus Curiae Blacks in Government (BIG) is a national nonprofit membership organization incorporated in Washington, D.C. in 1976. BIG is comprised of more than 250 chapters, and seeks to represent the interests of more than 2.5 million African Americans employed by federal, state and local government agencies. BIG has sought to promote excellence in government

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[1] The law firm of Howard, Rice, Nemerovski, Canady, Falk & Rabkin, A Professional Corporation, made a monetary contribution to the preparation of this brief.

through equality of opportunity and to promote the elimination of all vestiges of racism and discrimination. BIG believes affirmative action is necessary to remedy the effects of historic and institutionalized discrimination and to ensure equal opportunity for persons of color in public employment.

INTRODUCTION

The intent of these *amici* is to cast further light upon the last issue advanced in the Petition for Writ of Certiorari: whether states may enact laws that impede Title VII's national policy of encouraging state and local governments to adopt properly supported and narrowly crafted affirmative action plans as a means of remedying prior or possibly ongoing discrimination. We will argue that the reasoning and holding of the court below ignore the thrust of this Court's prior decisions which declare that policy, that the policy is well founded in the realities of the workplace, and that Proposition 209 should be held invalid because it stands as an obstacle to the full implementation of federal law. In addition to the other important reasons advanced by petitioner, this Court should grant *certiorari* in order to address and clarify the answer to this critical question.

ARGUMENT

I.

THE REASONING AND HOLDING OF THE COURT BELOW IGNORE THE THRUST OF THIS COURT'S PRIOR DECISIONS WHICH RECOGNIZE THE ENCOURAGEMENT OF PROPERLY CRAFTED AND PROPERLY SUPPORTED REMEDIAL AFFIRMATIVE ACTION PLANS AS AN IMPORTANT ASPECT OF FEDERAL POLICY UNDER TITLE VII.

In *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), the justices who voted to uphold Santa Clara County's affirmative action plan under Title VII disagreed about what should be required as a predicate for a permissible plan, but they did not disagree upon the importance of permissible plans to congressional objectives.

Justice Brennan's opinion for the Court in *Johnson* referred to the Court's prior opinion in *United Steelworkers v. Weber*, 433 U.S. 193 (1979) as "grounded in the recognition that *voluntary action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace.*" 480 U.S. at 630 (emphasis added).

Justice Stevens, concurring, recognized that "the challenged employment decision served the *legitimate purpose of creating diversity in a category of employment that had been almost an exclusive province of males in the past.*" *Id.* at 649 (emphasis added).

And Justice O'Connor, while insisting that affirmative action plans be limited to situations in which an employer has a "firm basis for believing that remedial

action was required" (*id.* at 652), nonetheless emphasized *"the importance of voluntary efforts to eliminate discrimination." Id.* (emphasis added). Justice O'Connor argued, as she had in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 291 (1986) (concurring in part and concurring in judgment) "that a contemporaneous finding of discrimination should not be required [as a predicate for an affirmative action plan] *because it would discourage voluntary efforts to remedy discrimination.*" 480 U.S. at 652 (emphasis added).

Properly supported and properly crafted affirmative action plans are especially important to the goals of Title VII – and for that matter to the goals of the Fourteenth Amendment – in the public sector. As Justice O'Connor observed in *Wygant*:

> "The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance." (*Wygant, supra*, 476 U.S. at 290 (O'Connor, J. concurring in part and concurring in judgment))

At least since *Adarand Constructors v. Pena*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), it has been clear that an affirmative action plan in the public sector must meet strict scrutiny requirements imposed by the Fourteenth Amendment upon racial classifications, but Justice O'Connor's opinion for the Court in that case reiterated that remedying prior discrimination will satisfy that test:

> "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this court has set out in previous cases." (132 L.Ed.2d at 188)

What is required as a predicate, it appears, is that there be a "strong basis in evidence for [the public entity's] conclusion that remedial action was necessary", *i.e.*, evidence approaching a *prima facie* case of constitutional or statutory violation (*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989), quoting *Wygant*, 476 U.S. at 277), and the absence of effective race-neutral alternatives (488 U.S. at 507-508).

II.

THE REALITIES OF THE WORKPLACE REQUIRE CONTINUED SUPPORT FOR REMEDIAL AFFIRMATIVE ACTION PLANS, BOTH AS A MEANS OF REMEDYING PRIOR DISCRIMINATION AND AS A CHECK AGAINST DISCRIMINATION WHICH MAY BE ONGOING BUT DIFFICULT TO IDENTIFY AND PROVE.

It is a common argument, and one in fact used by the supporters of Proposition 209, that there would be no need for affirmative action plans if only existing laws against discrimination were properly enforced. This argument overlooks two important realities. One is that there still exist pockets of unremedied past discrimination

which are better addressed voluntarily, through a properly crafted affirmative action plan, than by the costly, time-consuming, and unpredictable process of litigation. The other is that statistical disparities in particular job categories may reflect ongoing discrimination on the part of low- and middle-level management who are themselves not fully aware of the stereotypes which may inform their conduct.

While deliberate discrimination meets with both social and legal disapproval in contemporary America, social science research establishes that to a considerable degree race-based and sex-based stereotypes continue to have a significant negative impact upon the way managers evaluate the qualifications of minority individuals for various positions. *See generally*, Linda Hamilton Krieger, "The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity," 47 Stan. L. Rev. 1161, 1186-1188 (1995). *See also* Declaration of Marc Bendick, Jr., Ph.D., which is part of the record in this case. (Declaration in Support of Ex Parte Application for T.R.O. and Order to Show Cause Re Preliminary Injunction. Vol. I, pp. 53-85.) Professor Bendick reports that:

> "This dramatic change is what the non-minority public is thinking of when they tell public opinion pollsters that discrimination is no longer a problem. However, our testing studies make clear that they are only partially correct. Employment discrimination is still present, but it expresses itself less in the *treatment* of minorities during the hiring process than in *judgments* concerning their qualifications and abilities." (*Id.* at 75)

Such "unconscious" discrimination is generally beyond the practical reach of anti-discrimination laws on either disparate treatment or disparate impact theories. "[T]he problems of employment discrimination that are typical in the 1990s – [as described in paragraphs 30 through 41 of Professor Bendick's report] – are so subtle and woven into apparently-neutral processes that they are very difficult to isolate, document, and attack through conventional anti-discrimination enforcement alone" (*id.* at 81). Thus, a properly designed affirmative action plan may be the only effective means of counteracting and remedying this form of discrimination.

This was the conclusion of the Federal Glass Ceiling Commission – a 21-member bipartisan body appointed by President Bush and Congressional leaders and chaired by the Secretary of Labor pursuant to the Glass Ceiling Act (Section 204 of Public Law 102-166, the Civil Rights Act of 1991). In its fact-finding report ("Good for Business: Making Full Use of the Nation's Human Capital: March, 1995") the Commission identified as one of the barriers to the advancement of minorities and women in the private sector "conscious and unconscious stereotyping, prejudice, and bias related to gender, race and ethnicity." *Id.* at p. 8. And, in considering what works to overcome these barriers, the Commission stated:

> " . . . [T]he top leadership team of any business intent on change must communicate its desire down the line and then support its message with clearly defined expectations. Accountability reinforces the message from the top that progress toward inclusiveness is being assessed and will be rewarded. *Managers must be held accountable for the development and advancement of*

> *minorities and women. Goals and timetables must be agreed upon, measurable results must be established, and incentives, rewards, and penalties must be tied to performance in meeting the goals and achieving results."* (*Id.* at p. 42 (emphasis added))

While the Commission's observations focus on the private sector, there is no reason to believe that the situation in the public sector is any different. *See* Bendick Declaration, *supra*, pp. 62-67.

III.

PROPOSITION 209 SHOULD BE HELD INVALID BECAUSE IT STANDS AS AN OBSTACLE TO THE FULL IMPLEMENTATION OF FEDERAL LAW.

Proposition 209 purports to ban affirmative action programs which are both constitutionally permissible under *Croson* and important to the policies of Title VII as recognized under prior decisions of this Court. It would subject governmental entities seeking to remedy their own prior or ongoing discrimination to the precise dilemma which Title VII seeks to avoid. *See Weber*, 443 U.S. at 291 (Blackmun, J., concurring (absent permissible affirmative action "public employers are trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to minorities if affirmative action is taken.") As the district court observed, "voluntary affirmative action affords [employers] a safe passage" between these competing hazards. 946 F. Supp. at 516. Proposition 209 "obstructs the passageway and forces many employers into a place akin to the Strait of

Messina where they confront the Scylla of Title VII and the Charybdis of Proposition 209." 946 F. Supp. at 517.

In addition to the dilemma it poses for local government entities, who face conflicting directives under Title VII and Proposition 209 and must pay their own bills in the event liability is determined, Proposition 209 tends to defeat major objectives of the federal statute. Under this court's Equal Protection Clause decisions, affirmative action plans are valid only in a narrow range of circumstances, where there exists a compelling governmental interest such as remedying prior discrimination, where the plan is narrowly tailored to those interests, and where race-neutral alternatives are likely to be ineffective.

As the State conceded and the Circuit Court found, Proposition 209 would ban *constitutionally permissible* affirmative action programs which satisfy *Croson*, thus precluding voluntary remedial affirmative action *precisely in those situations where it is most needed* as a means of effectuating the policies of Title VII and the Equal Protection Clause. *Cf. Local 29 v. EEOC*, 478 U.S. 421, 448-49 (1986) (race-conscious affirmative action "may be the only effective way to ensure the full enjoyment of the rights protected by Title VII"). The result in such circumstances will be the maintenance of a *status quo* which perpetuates historic patterns of discrimination which it is the purpose of Title VII to eradicate. *Cf. e.g., Weber, supra*, 433 U.S. at 198-99 (without affirmative action requirement of prior craft experience from which Blacks had been excluded would perpetuate historic patterns of discrimination). As the Equal Opportunities Commission has recognized in its Guidelines:

> "Voluntary affirmative action to improve opportunities for minorities and women *must be encouraged and protected* in order to carry out the Congressional intent embodied in title VII." (29 C.F.R. Sec. 1608.1(c) (emphasis added))

In preserving an area for voluntary affirmative action plans to operate, Congress and this Court have established a careful balance between two conflicting concerns: Congress' intent "to root out invidious discrimination against any person on the basis of race or gender, and its goal of eliminating the lasting effects of discrimination against minorities." *Johnson, supra*, 480 U.S. at 649 (O'Connor, J. concurring). *Local 209* would dramatically upset that balance, contrary to Congressional policy. *Cf. Lodge 76, International Assoc. of Machinists v. Wisconsin Employment Relations Comm.*, 437 U.S. 232 (1976).

Congress, through Sections 708 and 1104 of the Civil Rights Act (42 U.S.C. §§ 2000e-7 and 2000h-4), incorporated into that Act well-established principles of conflict preemption: where Congress has not expressly provided for preemption and has not completely displaced state regulation by occupation of the field, federal law may nonetheless preempt state law to the extent that it actually conflicts with federal law. Such a conflict occurs either because 'compliance with both federal and state regulations is a physical impossibility', *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)." *California Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 281 (1987). Section 708 reflects the *Florida Lime*

principle: while declaring a general policy of non-preemption, it provides for preemption of any state law "which purports to require or permit the doing of any act which would be an unlawful employment practice"; and Section 1104, while disclaiming Congressional intent to occupy the field, nonetheless precludes enforcement of state law "inconsistent with any of the purposes of this Act or any provision thereof."

This Court's opinion in *Guerra* makes quite clear that a state law must pass *both* tests. The opinion stated the issue under Sections 708 and 1104 was "whether the California statute requires or permits employers to violate Title VII, as amended by the PDA, *or is inconsistent with the purposes of the statute.*" 479 U.S. at 283 (emphasis added). Its conclusion was that the California statute was not preempted "because it is not inconsistent with the purposes of the federal statute, nor does it require the doing of any act which is unlawful under Title VII." *Id.* at 292. Justice White's dissenting opinion likewise assumed that Section 1104 applied. 479 U.S. at 304, n.12 (White, J. dissenting). Only Justice Scalia was of the view that Section 708 controlled. 479 U.S. at 295 (Scalia, J. concurring). And subsequent case law confirms this dual approach. *Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 209 (1991).

IV.

THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO CLARIFY THE APPLICATION OF TITLE VII TO REMEDIAL AFFIRMATIVE ACTION PROGRAMS.

The opinion of the Court of Appeals in this case entirely ignores the body of jurisprudence discussed above. Indeed, it totally misconceives the nature of the preemption argument. As to Section 708, the court observed that Proposition 209 "does not remotely purport to require the doing of any act which would be an unlawful employment practice under Title VII." As to Section 1104, the court proclaimed that Section 703(j) of Title VII "conclusively demonstrates that Proposition 209 is entirely consistent" with the federal statute. On that ground, the court found it unnecessary to consider whether the EEOC's Guideline declaring the importance of affirmative action to the achievement of Congressional objectives was entitled to deference.

Section 703(j), however, merely makes clear that Title VII (absent court order) does not *require* an employer to grant preferential treatment in order to comply with the statute. As interpreted by the Supreme Court in *Weber*, that section does not in any way *prevent* an employer from voluntarily adopting an affirmative action program under appropriate circumstances, nor is it in any way that such conduct inconsistent with the principle declared in those cases is in fact *encouraged* by the goal of Title VII to "break down old patterns of racial segregation and hierarchy" (*Weber*, 443 U.S. 205-206), and to do so through voluntary compliance, the "preferred means of achieving

the objectives of Title VII." *Local 93, International Assoc. of Firefighters v. Cleveland*, 478 U.S. 501, 515 (1986).

The reasoning of the court below is explicable only on the assumption that what this Court, other federal courts, and the EEOC have said about the importance of affirmative action to the achievement of Congressional goals has no meaning. Viewed in that light, the opinion has implications far beyond the validity of Proposition 209. This Court has not decided a case involving the relationship between Title VII and affirmative action plans since *Johnson*. The pending case of *Piscataway, N.J. Township Board of Education v. Sharon Taxman*, No. 96-679, provides an opportunity for this Court to address that relationship in the context of a non-remedial plan. Remedial plans are far more common, however, and this case provides an opportunity for this Court to clarify the primary policy of Title VII in this important area.

CONCLUSION

For all the reasons above, the Court should grant certiorari and review the Ninth Circuit's decision below.

Respectfully submitted,

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Supreme Court of the United States

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COALITION FOR ECONOMIC EQUITY, et al.,

Petitioners,

v.

PETE WILSON, Governor of the State of California, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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I

Respondents do not dispute the pressing national significance of this case. Neither respondents Governor Wilson, et al. ("Wilson") nor respondent Californians Against Discrimination Against Preferences, Inc. ("CADAP") denies that Proposition 209 goes further than any state law has ever gone, selectively prohibiting all units of local and state government from even considering race- and sex-based preferences that are constitutionally **permissible**, including those narrowly tailored to redress discrimination or to integrate public schools. Nor do respondents deny that 209 resurrects the otherwise insoluble dilemma resolved by this Court in the line of Fourteenth Amendment cases stretching from *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), to *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), to *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200 (1995). These decisions create a safe harbor for governmental entities, allowing them to enact narrowly tailored remedial race and sex preferences, without having to confess that they themselves violated the equal protection rights of minorities or women. Proposition 209 destroys this safe harbor, leaving public entities "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent . . . discrimination and liability to nonminorities if affirmative action *is* taken." *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring) (italics in original). It is also uncontroverted that measures modeled on 209 have been proposed in more than half the states.

Rather than contesting the profound significance of this case, respondents simply deny that this Court's holdings in *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969), apply to Proposition 209. The lengths to which respondents go to evade the *Seattle-Hunter* holding, and the failure of this effort measured against the "simple yet central principle" set forth in these cases, underscores the case for granting certiorari. We reply briefly to each of respondents' principal arguments.

1. Respondents first argue, contrary to the conclusion reached by both the court of appeals and the district court, that the issues involved in this case are not sufficiently

"concrete" to warrant review without additional state court interpretations of 209. Wilson 3-4 (citing *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997)).[1]

In marked contrast to *Arizonans*, however, respondents do not and cannot explain how any state court interpretation of 209 could possibly eliminate, or even clarify, the constitutional question whether it imposes "special, and therefore impermissible, burdens on minority interests." *Seattle*, 458 U.S. at 476 n.18. To the contrary, respondents have no choice but to **admit** that "Proposition 209 would eliminate race and gender preferences that are **constitutionally permissible**, but not constitutionally required." Wilson 5-6 (emphasis added); CADAP 5, 18.[2]

For these reasons, both the district court and court of appeals properly answered this Court's question, "Is this conflict really necessary?" (*Arizonans*, 117 S. Ct. at 1072), in the affirmative. Citing the district court's finding that 209 targets constitutionally permissible programs, the court of appeals correctly concluded that: "Unlike in *Arizonans*, the State does not dispute that Proposition 209 operates to eliminate such programs." 110 F.3d at 1438.[3]

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[1] As the court of appeals noted, there has already been one state court decision interpreting 209. 110 F.3d at 1437 (citing *Lungren v. Superior Court*, 48 Cal. App. 4th 435 (1996)).

[2] At various points in their briefs, respondents misleadingly suggest that petitioners' Fourteenth Amendment argument turns on whether all programs banned by 209 are constitutionally **required**. *See, e.g.*, Wilson 7, 9-10; CADAP 4 & n.5. Clearly they are not, and petitioners have never so argued. The sole issue is whether California may enforce an initiative that precludes all units of state and local government from enacting or maintaining constitutionally **permissible** race- and sex-based preferences.

[3] Wilson respondents' suggestion that this controversy is not sufficiently "concrete," is all the more remarkable given that numerous state and local entities – **including Governor Wilson himself** – have taken steps to abolish programs in conflict with the initiative. As both courts below found, "Defendant/Appellant Pete Wilson, Governor of California, issued an Executive Order on November 6, 1996, implementing Proposition 209 to do just that." 110 F.3d at 1438. Most recently, on

2. Respondents next argue that the initiative's partial redundancy of existing law somehow immunizes it from a facial challenge. Wilson 4-5 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *see also* CADAP 9 n.8. But in **every** application of 209, the initiative gerrymanders the political process to foreclose participation by those seeking race- and sex-based preferences. Moreover, contrary to respondents' argument, 209's restatement of the pre-existing prohibition against "discriminat[ion]" cannot shield the ban on "preferential treatment" from a facial challenge, for then a state could **always** shield its laws from such challenges by similarly incorporating an existing constitutional rule. Indeed, following respondents' line of reasoning, one could not maintain a facial challenge to an initiative baldly proclaiming: "The state legislature shall not enact any statute beneficial to racial minorities." Because **some** of the statutes banned (e.g., race preferences that fail *Croson* scrutiny, or content-based hate-speech regulations) violate existing constitutional law, the initiative would be constitutional as applied to those

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September 9, 1997, Governor Wilson issued a list of 35 "Statutes in Violation of Proposition 209" that, in the Governor's words, must be "repealed or rewritten" to conform to the initiative. Among the programs specifically targeted are the California Summer Science and Technology Academy, which "identif[ies] public high school pupils with high academic potential in mathematics, science, and technology, with an emphasis on females and minority members, to participate in university-based research programs" (Cal. Educ. Code § 8631), and the American Indian Early Childhood Education Program which allows the State Superintendent of Public Instruction to apportion funds to be used for educational programs serving the needs of American Indian pupils. Cal. Educ. Code §§ 52060-52065. Governmental entities throughout the state have already begun to dismantle race- and sex-conscious affirmative action programs because of Proposition 209 – including those that have been shown to be narrowly tailored to redress a documented history of discrimination against minorities and women. For example, on September 16, 1997, the County of Contra Costa (one of the named defendants in this case) issued a directive ordering "[t]he County's MBE/WBE Programs for construction contracts, professional/personal services contracts, and purchasing . . . suspended" in light of the fact that "Proposition 209 is no longer stayed by court order."

statutes – yet would obviously be subject to a facial challenge as a racial classification.[4]

3. On the merits, respondents' arguments are irreconcilable with *Hunter* and *Seattle*. Both respondents' briefs confirm that their real complaint is with the "simple but central principle," repeatedly articulated in both cases, that the Equal Protection Clause prevents states from " 'plac[ing] special burdens on racial minorities within the governmental process,' thereby 'making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest.' " *Seattle*, 458 U.S. at 469-70 (quoting *Hunter*, 393 U.S. at 391, 395) (italics and brackets in original). The *Seattle* Court held that a state creates an impermissible "racial classification" (458 U.S. at 468, 483, 485) when it "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." *Id.* at 480 (citation omitted).[5]

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[4] This argument also brings respondents into direct conflict with *Seattle*. Initiative 350, of course, prohibited **all** race-conscious busing programs, whether or not they would satisfy equal protection scrutiny. *Seattle*, 458 U.S. at 462-63. The Court nevertheless held the initiative unconstitutional on its face, without considering whether it had some permissible applications to existing busing programs that were not tailored to satisfy Fourteenth Amendment standards. *See also Romer v. Evans*, 116 S. Ct. 1620 (1996) (striking down Colorado initiative on its face, notwithstanding the dissent's undisputed claim, *id.* at 1632-33, that the initiative had some constitutional applications).

[5] *See also, Seattle*, 458 U.S. at 476 n.18 ("The single narrow question . . . is whether the state has exercised its power in such a way as to place special, and therefore impermissible, burdens on minority interests."); *id.* at 485-86 (state action that "places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice" is "inherently suspect."); *id.* at 468, 476 ("the State may no more disadvantage any *particular* group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote. . . . ") (quoting *Hunter*, 393 U.S. at 393, original emphasis).

Despite *Seattle*'s repeated iteration of this principle, respondent CADAP entirely fails to acknowledge it. Wilson respondents, for their part, acknowledge the principle but then fail to apply it. Instead, respondents argue that 209's burden on the interests of minorities and women is beside the point, because the programs banned by 209 treat people differently based on their race or sex. Wilson 12-14; CADAP 13-15. If this were the test, however, then *Seattle* would have come out the other way. The Washington school districts' use of race-conscious busing **did** of course treat people differently according to race, using race to determine the schools to which students were assigned. *Seattle*, 458 U.S. at 461, 464 n.7. Furthermore, the use of race-conscious busing to eliminate *de facto* rather than *de jure* segregation in school assignments was constitutionally optional, **not** required, and surely no less "constitutionally suspect" than the programs abolished by Proposition 209. *See Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring).[6]

Respondents are equally wrong to attempt to distinguish this case from *Seattle* on the ground that 209 does nothing more than enact a ban on "discrimination" that mirrors the Equal Protection Clause. State 14-15; CADAP i, 1, 4, 17. Far from mirroring the Equal Protection Clause, 209's ban on **all** "preferential treatment" based on race or sex ignores its basic purpose. The very reason for applying heightened equal protection scrutiny to race- and sex-based distinctions (whether in the context of busing or in the context of affirmative action) is to determine whether they promote equality – or,

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[6] Respondents have no answer to the point that 209, just like Initiative 350, targets race-conscious programs designed to promote integration of public schools. Pet. 6, 19 n.14. While they suggest that there are perhaps some desegregation programs that may not be "preferential" (Wilson 7), they do not and cannot deny that 209 would eliminate magnet schools – or any of the other school desegregation programs documented in the record below – that accord preferences based on race or sex. Because of Proposition 209's dramatic impact on public education, respondent Delaine Eastin, the State Superintendent of Public Instruction, has expressly supported the Petition for Certiorari.

alternatively, whether they constitute invidious discrimination that denies equal protection: "It is only by applying strict scrutiny that we can distinguish between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination." *Jenkins*, 515 U.S. at 112 (O'Connor, J., concurring).[7] Respondents' attempt to characterize 209 as an inherently constitutional "antidiscrimination" measure is therefore meritless.[8]

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[7] This court has consistently recognized that preferential race- or sex-conscious affirmative action is sometimes "the **only** effective way" to eliminate the vestiges of discrimination. *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 449 (1986) (citing cases); *see also Johnson v. Transp. Agency*, 480 U.S. 616, 621-22, 637 (1987); *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1978).

[8] At one point, CADAP admits that 209's "principal effect . . . is to eliminate affirmative action preferences." CADAP 18. In fact, respondents have not identified **any** other effect. Just as minorities were the ones harmed by Initiative 350's ban on racial busing (*Seattle*, 458 U.S. at 474-75), women and minorities are the ones harmed by 209's ban on affirmative action preferences.

For this reason, respondents' attempt to align 209 with state equal protection clauses, state equal rights amendments, and federal antidiscrimination laws is unavailing. CADAP 15-16. CADAP makes the remarkable argument that all these laws "'selectively' condemn racial and gender preferences." *Id.* at 15. Yet the laws cited provide protections for **both** women and men, or for **both** women and minorities. For example, California's equal protection clause, like other states' equal rights amendments, **enlarge** women's protection against discrimination. *See, e.g.*, *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 17-20 (1971) (recognizing that "[w]omen . . . have historically labored under severe legal and social disabilities" and striking down prohibition against women bartenders). Unlike 209, such laws do **not** merely **preclude** women from seeking remedial affirmative action programs. Likewise, even assuming that the *Hunter-Seattle* principle could apply to **federal** legislation, Title VII protects both minorities and nonminorities from discrimination. By contrast, 209 adds nothing to existing antidiscrimination protections for minorities and women; all it does is to eliminate measures that inure to their benefit, including those narrowly tailored to remedy discrimination.

4. CADAP argues that petitioners seek an unequal political regime or one-way ratchet, under which minorities and women enjoy **superior** rights of participation. CADAP 7, 8, 10-11. As an initial matter, CADAP is wrong to assert that the adherence to the *Hunter-Seattle* principle means that "nonminorities have no [equivalent] equal protection right to be free of state constitutional amendments enhancing the nondiscrimination rights of others beyond the Fourteenth Amendment's floor." CADAP 7. Whites **could**, for example, legitimately challenge, on *Hunter-Seattle* grounds, a state constitutional amendment prohibiting all units of state and local government from ever **repealing** their racial preferences, while leaving those entities free to repeal all other preferences. Such an amendment would selectively – and thus unconstitutionally – close off the political process to whites. While government may structure its political processes along race-neutral lines, it may not lock out **either** whites **or** racial minorities, while leaving those processes open to all others.

Contrary to CADAP's assertion, petitioners have never made the preposterous argument that, under *Hunter* and *Seattle*, "minorities must win every 'important political battle' at the state level." *Id.* at 11. The constitutional defect in 209 has nothing whatsoever to do with political **results**, but inheres in its denial of an equal **opportunity** to participate in the political process. *See Hunter*, 391 U.S. at 395 (Harlan, J., concurring) (law "making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest" is "discriminatory on its face"), *quoted in Seattle*, 458 U.S. at 470.

CADAP therefore misses the point of *Seattle* and *Hunter* when it argues that the Fourteenth Amendment is not "a ceiling establishing the maximum permissible scope of nondiscrimination above which no state may ascend." CADAP 6. *Hunter* and *Seattle* merely hold that the Fourteenth Amendment principle of nondiscrimination applies to **the political process itself**, and not just to the **products** of that process: "what we find objectionable about Initiative 350 is the comparative burden it imposes on minority participation in the political process – that is, the racial nature of the way it

structures the process of decisionmaking." *Seattle*, 458 U.S. at 490 n.23.

5. Nowhere is CADAP's failure to confront *Seattle*'s "simple but central principle" more evident than in their sink-or-swim dependence on a footnote in Justice Powell's dissent and the majority's footnote responding to that dissent. CADAP 12-13; *see Seattle*, 458 U.S. at 480 n.23 (majority), *id.* at 498 n.14 (dissent). CADAP omits most of – and then mischaracterizes – the majority's response in a way that leaves the result and holding in *Seattle* nonsensical.

Justice Powell's dissent asserted that: "After today's decision it is unclear whether the State may set policy in any area of race relations where a local governmental body arguably has done 'more' than the Fourteenth Amendment requires." *Id.* at 498 n.14. Contrary to CADAP's representation, the Court's response was not that the state may **always** thereafter intervene in local decisions regarding matters of race. Rather, the majority responded that the state may intervene "in a race-neutral manner," but may not **selectively** burden the ability of minorities to obtain beneficial legislation. *Id.* at 480 n.23.[9] The majority's response thus does not give states carte blanche to intervene in local matters concerning race. Rather, consistent with numerous statements throughout its opinion, the majority approves those interventions into local decisionmaking that operate in a race-neutral

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[9] *See* 458 U.S. at 480 n.23 (citations omitted, boldface added):

> [W]hat we find objectionable about Initiative 350 is the **comparative burden it imposes on minority participation in the political process** – that is, the racial nature of the way in which it structures the *process* of decisionmaking. It is evident, then, that the horribles paraded by the dissent – which have nothing to do with the ability of minorities to participate in the process of self-government – are entirely unrelated to this case. It is equally clear, as we have noted at several points in our opinion, that **the State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a race-neutral manner.**

manner – i.e., those that do **not** specially burden race-conscious legislation in a particular area, but also burden other types of legislation in that area.

6. Both respondents mistakenly attempt to align this case with *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982) (Wilson 19-20; CADAP 19-22), despite the fact that the initiative upheld in *Crawford* – unlike 209 – did not impose **any** burden on minorities' ability to participate in the political process. Proposition I left state and local entities entirely free to adopt racial busing; it simply overruled a prior judicial interpretation of the California Constitution **requiring** racial busing to redress *de facto* (as well as *de jure*) segregation. *Id.* at 536, 547 (Blackmun, J. concurring). After Proposition I, citizens could still lobby local and state school boards to adopt or, for that matter, to rescind their busing programs **voluntarily**. It was precisely on this ground that the Court distinguished *Seattle*. *See Crawford*, 458 U.S. at 536 & n.12. The Court explained that "the simple repeal or modification of desegregation or antidiscrimination laws, **without more**, never has been viewed as embodying a presumptively invalid racial classification." *Id.* at 539 (emphasis added). Quoting directly from *Hunter*, the *Crawford* Court defined that "something more" as the placement of a "special burde[n] on racial minorities within the governmental process." *Id.* at 541. Respondents do not deny that 209 imposes a "special" burden on future attempts to obtain race- and sex-based preferences from any unit of state or local government, no matter how necessary to promote integration or remedy discrimination.

7. At bottom, respondents' arguments rest upon the superficially appealing but ultimately indefensible proposition that "a state may require its subordinate entities to take any action consistent with the Constitution." CADAP 24. As explained above, this position directly conflicts with *Seattle* and *Hunter*, which restrict states from "remov[ing] the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body in such a way as to burden minority interests." *Seattle*, 458 U.S. at

474.[10] It also conflicts with this Court's recent decision in *Romer v. Evans*, 116 S. Ct. 1620 (1996). The *Romer* majority expressly rejected the position, asserted in the dissent and embraced by respondents here, that "a law that is valid in its substance is automatically valid in its level of enactment." *Id.* at 1631 (Scalia, J., dissenting). Instead, *Romer* held that: "Central to both the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that the government **and each of its parts** remain open on impartial terms to all who seek its assistance." *Id.* at 1628. (boldface added). It is just this principle that respondents deny, in arguing that there are **no** limits upon the State's power to lock shut the doors of its "subordinate entities" to those seeking remedial race- and sex-based preferences.[11]

Respectfully submitted,

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[10] Without expressly acknowledging the "simple but central principle" enunciated in *Seattle* and *Hunter* (much less the obvious conflict between that principle and its own argument), CADAP urges this Court to "reverse *Seattle*," if the Court disagrees with its assertion that each state has unlimited power to "require its subordinate entities to taken any action consistent with the Constitution." CADAP 24.

[11] It is no answer to assert, as do respondents, that the burden of obtaining a state constitutional amendment is irrelevant, because Proposition 209 merely involves a "substantive" change in the law of the State of California. CADAP 23. Amendment 2 could equally have been characterized as a "substantive" change in state law, to forbid any antidiscrimination protections benefitting gays and lesbians. So too, Initiative 350 (which, like 209, did not mention the political process) could have been characterized – and **was** in fact characterized – as a "substantive" ban on racial busing. *Seattle*, 458 U.S. at 462-63.